Supreme Court, U.S.
FILED
02 1687 MAY 15 2003
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

ROGER MILLER AND RUTH MILLER,
Petitioners,

v.

LAWRENCE SILVER AND SILVER & FIELD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

HERBERT J. PATT
ANDRES & ANDRES
2041 North Main Street
Santa Ana, CA 92706

BARRY S. SIMON
PAUL MOGIN *
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

146 PP

QUESTIONS PRESENTED

1. When parties to an arbitration agreement governed by the Federal Arbitration Act ("FAA") are directed by a state court to arbitrate their dispute and do so, may the losing party later use the All Writs Act, 28 U.S.C. § 1651(a), to launch a collateral attack on the arbitrator's award in federal court, instead of challenging the award pursuant to the FAA or state law?

2. Does this Court's holding in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)—that a federal court must follow traditional principles of equity—apply only to injunctions under Fed. R. Civ. P. 65, and not to an injunction issued under the All Writs Act "to effectuate and prevent the frustration of orders [the court] has previously issued," *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977)?

3. May a federal court, merely by retaining exclusive jurisdiction to interpret a class action settlement, thereby acquire exclusive jurisdiction over any state-law dispute between a class member and a third party, as long as the third party contends that damages sought by the class member duplicate damages previously received under the settlement?

LIST OF PARTIES

Petitioners Roger Miller and Ruth Miller, who had been members of a plaintiffs' settlement class certified by the District Court, opposed respondents' motion in the District Court to enjoin enforcement of the arbitration award they had won in California, and were appellants and cross-appellees in the Court of Appeals. Respondents Lawrence Silver and Silver & Field were movants in the District Court and appellees and cross-appellants in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Silver's Representation of the Millers in California State Court.	1
B. The Class Action.	2
C. Silver's Claim to Part of the Millers' Settlement Share.	3
D. The Arbitration.	4
E. Silver's Collateral Attack on the Arbitration Award.	5
F. The Decision of the Court of Appeals.	8
REASONS FOR GRANTING THE WRIT	10
I. THE CIRCUITS ARE SPLIT ON WHETHER ARBITRATION AWARDS MAY BE COLLATERALLY ATTACKED.	11
A. The Majority of Circuits To Address the Question Have Held That Arbitration Awards Are Not Subject to Collateral Attack.	11
B. The Second and Fourth Circuits Permit Collateral Attacks on Arbitration Awards	13

TABLE OF CONTENTS—Continued

Page

C. The Decisions Permitting Collateral Attacks Thwart the Central Purpose of Arbitration. 14

D. The Question Is Important. 18

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GRUPO MEXICANO DE DESARROLLO, S.A. V. ALLIANCE BOND FUND, INC* 19

A. Grupo *Mexicano* Held That the All Writs Act, Like Rule 65, Requires Application of Traditional Principles of Equity. 21

B. The All Writs Act Is Properly Construed To Require Application of Traditional Principles of Equity. 21

C. *New York Telephone* Does Not Permit Federal Courts To Issue Injunctions Under the All Writs Act Without Regard to Established Principles of Equitable Relief. 23

D. The Question Is Important. 25

III. FEDERAL COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OVER DISPUTES BETWEEN SETTLING CLASS MEMBERS AND ANY THIRD PARTY WHO RAISES A DEFENSE OF DOUBLE RECOVERY 27

CONCLUSION 29

TABLE OF CONTENTS—Continued

APPENDICES		Page
A.	Opinion of the Court of Appeals (January 17, 2003)	1a
B.	Opinion and Order of the District Court (August 24, 2001)	48a
C.	Memorandum of the District Court (April 22, 1999)	64a
D.	Order of the District Court (April 22, 1999)	70a
E.	Order of the District Court (June 22, 1999)	71a
F.	Oral Ruling of the District Court (June 21, 1999)	72a
G.	Order of the Court of Appeals Denying Rehearing and Rehearing En Banc (February 14, 2003)	76a
H.	All Writs Act, 28 U.S.C. § 1651	99a
I.	Federal Arbitration Act, 9 U.S.C. §§ 1-16 (selected provisions)	100a
J.	California Code of Civil Procedure, tit. 9, ch. 4 (selected provisions)	104a

TABLE OF AUTHORITIES

CASES	Page
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)	25
A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401 (9th Cir. 1992)	17
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)	13
Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285 (1970)	24
Atlas Life Insurance Co. v. W.I. Southern, Inc., 306 U.S. 563 (1939)	19
In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985)	26
Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854)	20
Carlisle v. United States, 517 U.S. 416 (1996)	22
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	27
Clinton v. Goldsmith, 526 U.S. 529 (1999)	23
In re Columbia/HCA Healthcare Corp., 93 F. Supp. 2d 876 (M.D. Tenn. 2000)	26
Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982)	11, 12
District of Columbia Court of Appeals v. Feldman 460 U.S. 462 (1983)	15
De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945)	21, 22, 23
Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 205 F.3d 906 (6th Cir. 2000)	12
Eastern Associated Coal Corp. v. UMW of Am., Dist. 17, 531 U.S. 57 (2000)	16
Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981).	26

TABLE OF AUTHORITIES—Continued

	Page
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	24, 28
Foster v. Turley, 808 F.2d 38 (10th Cir. 1986).....	12
Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).....	8, 19, 20, 21, 22
Heck v. Humphrey, 512 U.S. 477 (1994).....	15
Hedges v. Dixon County, 150 U.S. 182 (1893).....	20
Jos. L. Muscarelle, Inc. v. Central Iron Mfg. Co., 328 F.2d 791 (3d Cir. 1964).....	29
Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32 (2d Cir. 1951).....	17
Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994)	9
LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986)	12
Magniac v. Thomson, 56 U.S. (15 How.) 281 (1853).....	20
Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001)	15, 16
Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085 (2d Cir. 1993)	14
Miller v. Silver, No. G030054, 2003 WL 264758 (Cal. Ct. App. Feb. 10, 2003).....	13
Miller v. Superior Court, 58 Cal. Rptr. 584 (Ct. App. 1996)	2
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)	15
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986).....	14, 15
Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985)	22, 25
Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)....	24

TABLE OF AUTHORITIES—Continued

Page

Phillips Petroleum Co. v. Arco Alaska, Inc., Civ. A. 7177, 1988 WL 60380 (Del. Ch. June 14, 1988) 12
Pisciotta v. Shearson Lehman Bros., 629 A.2d 520 (D.C. 1993) 12
Prudential Securities Inc. v. Hornsby, 865 F. Supp. 447 (N.D. Ill. 1994) 12
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 15
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 24
Sander v. Weyerhaeuser Co., 966 F.2d 501 (9th Cir. 1992) 12
Sheldon v. Vermonty, 269 F.3d 1202 (10th Cir. 2001) 16
Southland Corp. v. Keating, 465 U.S. 1 (1984) 13, 16
Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289 (9th Cir. 1987) 15
Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 366 (2002) 25, 26
Tafflin v. Levitt, 493 U.S. 455 (1990) 28
Tamari v. Bache & Co. (Lebanon) S. A. L., 565 F.2d 1194 (7th Cir. 1977) 12
Trans Chemical Ltd. v. China National Machinery Import & Export Corp., 161 F.3d 314 (5th Cir. 1998) 17
United States v. Mayer, 235 U.S. 55 (1914) 22
United States v. New York Telephone Co., 434 U.S. 159 (1977) ..... 8, *passim*
Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) 27, 28

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS — Page

U.S. CONST. art VI, § 2 28
U.S. CONST. amend. X 24

STATUTES

All Writs Act, 28 U.S.C. § 1651 ..... 1, *passim*
Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993 18
Anti-Injunction Act, 28 U.S.C. § 2283 ..... 9, 29
Cal. Civ. Proc. Code § 1286.2 (West Supp. 2003) 13, 16
Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... 1, *passim*
9 U.S.C. § 2 ..... 11, 13
9 U.S.C. § 10 12
9 U.S.C. § 10(a) 13
9 U.S.C. § 11 12
9 U.S.C. § 12 14
Judiciary Act of 1789, 1 Stat. 73 ..... 19, 21, 22
Sherman Act 23
28 U.S.C. §§ 651-658 18

MISCELLANEOUS

A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1928) 19
Fed. R. Civ. P. 60(b) 12
Fed. R. Civ. P. 65 ..... 20, 21
Fed. R. Crim. P. 33 22
HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY (2d ed. 1948) 20
Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000) 26

PETITION FOR A WRIT OF CERTIORARI

Petitioners Roger Miller and Ruth Miller pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 17, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 315 F.3d 417 and is reproduced at Appendix ("A.") 1a. The order of the District Court is reported at 162 F. Supp. 2d 387 and is reproduced at A. 48a.

JURISDICTION

The order of the District Court was entered August 24, 2001. The judgment of the Court of Appeals was entered January 17, 2003, and a timely petition for rehearing was denied February 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), is reproduced at A. 99a. Pertinent provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and Title 9 of the California Code of Civil Procedure are reproduced at A. 100a and A. 104a, respectively.

STATEMENT

A. Silver's Representation of the Millers in California State Court.

In 1986, the Millers purchased a Honda dealership in California. A. 20a. As respondents Lawrence Silver and Silver & Field (hereafter collectively "Silver") later admitted, the Millers "overpaid," because "[u]nbeknownst to the Millers," the sellers' success stemmed from "the favored treatment they received as a result of bribes" to Honda executives. C.A. App. 1476.

After a nationwide bribery scheme involving Honda came to light in 1994, the Millers retained Silver as counsel. A. 20a. On behalf of other clients, Silver brought RICO claims against Honda in federal court and specifically pleaded a causal connection between the bribery scheme and the clients' injuries. A. 53a; C.A. App. 1077-78. But he brought the Millers' claims against Honda in California state court and did not specifically plead such a connection. *Id.* 796-805. The state court thereafter dismissed the Millers' RICO claim and ordered them to exhaust their state-law claims before an administrative agency. *Id.* 596-97.[1]

After disagreements arose, Silver withdrew as the Millers' counsel. A. 21a. In March 1997, the Millers sued Silver in California state court, alleging legal malpractice in the handling of their state-court action against Honda. *Id.* 23a. The Millers then agreed to dismiss the malpractice suit without prejudice, in return for Silver's agreement to toll the statute of limitations. *Id.*

B. The Class Action.

The Millers' new counsel voluntarily dismissed their state-court action against Honda and sued Honda in federal court. *Id.* 21a-22a. By then, all federal actions against Honda, including a class action, had been ordered transferred to the District of Maryland for multi-district litigation ("MDL") proceedings. *Id.* 22a. The court had already denied motions to dismiss RICO claims against Honda, *id.* 54a; but after the

---

[1] An appellate court later set aside the exhaustion ruling, but it allowed the trial court to decide whether to refer the Millers' claims to the same agency under the doctrine of primary jurisdiction. *Miller v. Superior Court*, 58 Cal. Rptr. 584 (Ct. App. 1996). The Millers voluntarily dismissed their state-court action against Honda before the trial court decided whether to again send the Millers to the agency but this time rely on the doctrine of primary jurisdiction. A. 21a.

transfer of the Millers' suit, Honda moved to dismiss their complaint, contending that the voluntary dismissal in state court precluded a later action based on the same claims. *Id.*

With Honda's motion still pending, the class action was settled. *Id.* 50a. Payments to class members were determined by an "estimate[] [of] the number of cars diverted from each Class member" by the bribery scheme, without regard to any overpayment by a class member in buying a dealership from a bribe-paying dealer. C.A. App. 547. At a hearing, the District Court made clear its intention to approve the settlement (which it later did, A. 51a), even though the damages formula provided no compensation for special injuries apart from those caused by the diversion of vehicles from class members. *See* Tr. of Sept. 28, 1998, at 92, 272. With Honda's motion to dismiss their action still pending, the Millers faced the possibility of obtaining nothing if they opted out of the class, and therefore they did not do so. C.A. App. 1630. The class settlement agreement, which provided that it was to be interpreted in accordance with California substantive law, broadly released claims against the settling defendants, including any claims related to payments by a Honda dealership to a Honda employee. *Id.* 524, 527-29. But although the release protected some parties besides the settling defendants, it did not encompass claims for legal malpractice against class members' former attorneys based on services performed in state court. *Id.* 527-29.

C. Silver's Claim to Part of the Millers' Settlement Share.

After the settlement, Silver filed a "Notice of Lien" in the MDL action, claiming a right to part of the Millers' settlement share because of his work on their behalf in state court. A. 24a. The Millers moved to strike the Notice, contending that under California law an attorney's lien may be established only in an independent action, and that because the dispute regarding the lien would raise only questions of

state law, the District Court lacked jurisdiction (the Millers and Silver are all California citizens, *id.* 19a). C.A. App. 556-73.

While the Millers' motion to strike was pending, and with the agreement to toll the statute of limitations about to expire, the Millers again sued Silver in California state court (the Superior Court of Orange County). A. 24a. The Millers acknowledged they had mitigated their damages through the class action, but alleged they would have recovered $7 million more but for Silver's malpractice in their state-court action against Honda. C.A. App. 879. Although Silver provided the District Court with a copy of the Millers' complaint, *id.* 865-887, he did not move the court to take jurisdiction over the Millers' claim. *Id.* 605-35, 865-66; *see also id.* 923-25.

The District Court ruled that it lacked jurisdiction to decide the merits of the lien. A. 66a-68a. The court nevertheless refused to strike the notice of lien, but ruled that any further effort to enforce the lien would have to be decided in state court. *Id.* 70a.

D. The Arbitration.

In the malpractice suit in California state court, Silver then moved to compel arbitration, citing a clause in his retainer agreement. *Id.* 25a. The state court granted Silver's motion and ordered the parties to submit the malpractice claim to arbitration. *Id.* The arbitrator was Richard J. Beacom, a former Presiding Judge of the Orange County Superior Court. C. A. App. 1498. The parties presented fifteen days of testimony, followed by lengthy written closing arguments and rebuttals. *Id.* 1007-1195; A. 51a. Just as Silver had not asked the District Court to exercise jurisdiction over the malpractice claim, and had not asked the state court to

withhold any issues from the arbitrator, in the arbitration Silver again did not challenge jurisdiction. *Id.* 1007-71, 1118-39.[2]

The arbitrator awarded the Millers nothing for misallocation of cars while they owned their dealership, but awarded $7,475,000 in "blue sky damages" they should have recovered from Honda because they had overpaid for goodwill when they purchased the dealership. A. 52a. The arbitrator noted that they had not been compensated for that loss in the class action. C.A. App. 979.[3] He also awarded $476,000 for malpractice in handling the Millers' claims against other parties to their state-court action and $871,000 in attorney's fees. *Id.* 52a. Finally, he awarded Silver nothing on his cross-complaint for legal fees. *Id.*

E. Silver's Collateral Attack on the Arbitration Award.

Instead of filing a timely motion to vacate the award under the FAA or California's statute governing judicial review of arbitration awards, Silver moved the District Court in Maryland to enjoin the Millers from enforcing the award, which he claimed "undercut[ ]" the class action settlement.

---

[2] One of Silver's exhibits in the arbitration was a 1998 letter to the Millers from their then-counsel in the class action. C.A. App. 1290-1300. Their counsel had asserted that, in negotiating the Millers' settlement share with counsel for the class, they had been able to obtain an extra year of cars (for the year before the Millers closed on their dealership purchase), or $1.6 million. *Id.* 1295. In urging the Millers to settle and not opt out of the class, the Millers' counsel claimed that if class counsel looked into the matter in depth, they would realize that they had allocated the Millers an extra year of cars to which they otherwise would not be entitled. *Id.*

[3] Silver's colleague, Mark Field, had admitted in the arbitration that class members who had purchased from bribe-paying dealers had been given no extra consideration in the settlement. C.A. App. 1717-18.

C.A. App. 961[4] He contended—for the first time—that the arbitrator had usurped the District Court's exclusive jurisdiction (which it had retained in its order approving the settlement) over "implementation, interpretation and enforcement of the Settlement Agreement." *Id.* 971-75. Silver did not attempt to establish any of the grounds for vacating an arbitration award specified in the FAA or state law; indeed, he urged the District Court to intervene in part because under California law "[t]he award may not be overturned by the Superior Court except upon a showing that it was procured by means of fraud, corruption, or undue means . . . ." *Id.* 961.

Despite the Millers' objection that Silver's challenge to the arbitration award was improper, the District Court ruled that it had "jurisdiction and authority under the All Writs Act" to enjoin the Millers from enforcing the $7,475,000 award of blue sky damages. A. 62a.[5] In issuing its injunction, the court did not consider whether Silver could demonstrate any recognized basis for vacating an arbitration award under the FAA or California law. Nor did it address traditional principles of equitable relief.

Instead, after identifying "five flaws in the Millers' [malpractice] theory," *id.* 53a; *see also id.* 53a-58a, the court, which did not have before it the testimony or exhibits in the arbitration, pointed to facts purportedly justifying resort to the All Writs Act. *Id.* 60a-62a. In the court's view, "the Millers made arguments before the arbitrator about the Honda-related

---

[4] Although Silver never represented the Millers in the MDL proceedings, he had extensively participated in those proceedings on behalf of other clients and had been named by the District Court as a member of the Plaintiffs' Executive Committee. C.A. App. 1478-79.

[5] The court also barred the Millers from enforcing the award of attorney's fees, although it said that it would "permit" the Millers to ask the court to determine the fees incurred in pursuing their claim for blue sky damages, and that it would then modify the injunction to allow the Millers to enforce the remainder of the supplemental award. A. 62a.

litigation that were so totally without merit that they can only be characterized as untrue." *Id.* 61a. Although the court said it "recognize[d] that an arbitration award may not be vacated except under extremely narrow circumstances," it reasoned that "the cases reciting this rule ordinarily arise where a party is seeking to vacate an award based upon an alleged error intrinsic in the arbitration proceeding itself." *Id.* 59a-60a. The court deemed those cases inapplicable because, although "the arbitrator erred in his apparent findings," it was "enjoining the award he entered not because of any mistake he made but because the Millers had no right to make before him the deceptive arguments they did, misrepresenting what had occurred during the Honda bribery litigation." *Id.* 60a. The court further criticized the arguments the Millers had made in moving to strike Silver's Notice of Lien. The court faulted the Millers for "misrepresent[ing] that issues of state law would predominate in resolution of the dispute," and "not disclos[ing] that . . . [their] legal malpractice theory . . . would require an intimate knowledge of the legal issues involved in the Honda MDL proceedings" because it would distinguish blue sky damages from the allocation damages they had received in the class action settlement. *Id.* 61a. The court opined that "[r]esolution of that issue involved interpretation of the MDL settlement agreement and, as the Millers knew, the settlement agreement conferred exclusive jurisdiction upon this court to interpret its terms." *Id.*[6]

---

[6] Despite Silver's reliance in the arbitration on the letter which had asserted that the Millers' settlement share included $1.6 million for misallocation of vehicles in the year before their purchase, C.A. App. 987-89, 1067, 1124-25, the District Court also accused the Millers of "withh[o]ld[ing] from the arbitrator that they received $1 million for 250 cars apportioned to them before they purchased their dealership." A. 61a. The $1 million figure came from Silver's counsel, who had told the court that the Millers' former counsel "were in error" in their 1998 letter, C.A.

F. The Decision of the Court of Appeals.

The Millers appealed, contending, *inter alia*, that arbitration awards may not be collaterally attacked but instead must be challenged consistently with the procedures and grounds for relief specified in the FAA and state arbitration statutes; that under *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), a federal court's power under the All Writs Act is defined by traditional principles of equity, which the District Court had failed to apply in issuing the injunction; and that the All Writs Act does not apply because another statute, the California arbitration statute, specifically addresses review of the award in the arbitration ordered by the California court. C.A. Appellants' Opening Br. 28-33. A divided panel of the Fourth Circuit[7] affirmed the injunction. A. 1a.

The majority held that the injunction was proper because the All Writs Act, as construed in *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977), permits the issuance of "such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." A. 33a-34a. The majority did not apply traditional principles of equitable relief or consider whether Silver had established any of the grounds for vacating an arbitration award recognized by California law or the FAA.

The majority acknowledged that the District Court had "identifie[d] several issues regarding the merits of the Millers' malpractice claim about which the District Court

---

App. 1605, but that class counsel had said that "it appeared that the Millers had received approximately $1 million" too much. Attachment to C.A. Appellees' Opening Br., at 2.

[7] Hamilton, Senior Circuit Judge, joined by Hilton, Chief United States District Judge for the Eastern District of Virginia; Circuit Judge Traxler dissented.

disagreed with the arbitrator's resolution." A. 33a. But it read the District Court's opinion as relying upon only one of those issues in entering the injunction, namely, "the nature of the damages" the Millers had been awarded under the class action settlement. *Id.* Reliance upon that point of disagreement with the arbitrator was proper, the majority reasoned, because the Millers' attempt to recover blue sky damages "raised an interpretive question" under the class action settlement agreement, and the District Court had "exclusive jurisdiction to resolve such interpretative question." *Id.* 35a. The injunction was therefore "necessary to prevent direct frustration" of the order approving the settlement. *Id.* 36a. The majority also described the injunction as "necessary to cure the injustices created by the Millers through their abuse of the MDL process." *Id.*[8]

Judge Traxler dissented. Noting this Court's admonition in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994), that "[f]ederal courts . . . possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree," A. 46a-47a, Judge Traxler "emphasize[d] that the proper analytical focus is on whether the injunction qualified as an exercise of power 'in aid of' jurisdiction under the [All Writs Act], as opposed to whether and to what extent the settlement order purported to retain jurisdiction over matters related to the MDL litigation." *Id.* 46a. Judge Traxler also explained why he did not read *New York Telephone* to authorize enjoining enforcement of an award returned in an arbitration about alleged malpractice in state-court litigation:

> Because Silver did not participate in the MDL proceedings as either a litigant or as counsel for the

---

[8] The majority addressed the All Writs Act in just five paragraphs and chose to devote most of its opinion to a subsidiary issue raised by the Millers, whether the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. A. 36a-41a; C.A. Appellants' Opening Br. 49-53.

> Millers, the dispute between Silver and the Millers is not directly before the district court and does not threaten its settlement order in the same way as would a post-settlement dispute between the Millers and their MDL counsel or the Millers and Honda. . . .
>
> . . . .
>
> With respect, I cannot conclude that the arbitration award, arising from a California state malpractice action, threatened the integrity of the district court's order. The Millers are not attempting to recover, directly or indirectly, any additional damages from Honda. They are not relitigating any of their claims against Honda that were resolved in the MDL litigation or otherwise collaterally attacking the district court's settlement order. The Millers's claims in arbitration involved the completely distinct legal issue of whether, under California law, Silver committed malpractice in a prior state action that was never before the district court.

A. 45a-46a.

REASONS FOR GRANTING THE WRIT

This case raises important questions about the permissibility of collateral attacks on arbitration awards and about the power conferred on federal courts by the All Writs Act. In reliance upon that Act, the Court of Appeals upheld an extraordinary injunction, which remains in place today, against enforcement of an award duly returned by an unbiased arbitrator in an arbitration ordered by a state court—on the motion of the very parties who later sought the injunction. The injunction was issued and upheld without regard to the provisions of either the FAA or California's statute governing review of arbitration awards, and without regard to traditional principles of equitable relief.

I. THE CIRCUITS ARE SPLIT ON WHETHER ARBITRATION AWARDS MAY BE COLLATERALLY ATTACKED.

The Circuits are divided as to whether arbitration awards governed by the FAA must be challenged, if at all, under the FAA or the applicable state arbitration statute. Four Circuits have held that the judicial-review procedures and standards established by the FAA and state arbitration statutes are the exclusive means of challenging an arbitration award. With the decision of the Court of Appeals in this case, two Circuits have now permitted federal district courts to entertain requests for relief that bypass those established procedures and standards in favor of a collateral attack.

A. The Majority of Circuits To Address the Question Have Held That Arbitration Awards Are Not Subject to Collateral Attack.

The Sixth, Seventh, Ninth, and Tenth Circuits have all held that awards in arbitrations subject to the FAA may not be collaterally attacked:

—The Sixth Circuit has concluded that arbitration awards are not subject to collateral attack. In *Corey v. New York Stock Exchange*, 691 F.2d 1205 (6th Cir. 1982), it held that summary judgment was properly granted against an investor who, after losing an arbitration sponsored by the New York Stock Exchange, sued the Exchange over the procedures followed in the arbitration, instead of seeking review under the FAA. The Sixth Circuit ruled that the suit was "an impermissible collateral attack on the award." *Id.* at 1212.

> The [FAA] provides the exclusive remedy for challenging an award on the grounds raised by Corey. . . . Once an arbitrator has rendered a decision the award is binding on the parties unless they challenge the underlying contract to arbitrate pursuant to section 2 or avail themselves of the review provisions of

> sections 10 and 11. . . . [T]he [FAA] provides no other avenue by which an arbitration award may be challenged.

Id.; *accord Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910 (6th Cir. 2000).

—The Seventh Circuit has held that a claim of misconduct in arbitration proceedings could be raised only under § 10 of the FAA, 9 U.S.C. § 10, and could not be presented through a complaint seeking termination of an ongoing arbitration proceeding. *See Tamari v. Bache & Co. (Lebanon) S. A. L*, 565 F.2d 1194, 1202 (7th Cir. 1977); *accord Prudential Sec. Inc. v. Hornsby*, 865 F. Supp. 447, 450 (N.D. Ill. 1994).

—The Ninth Circuit "has been extremely unwilling to upset the streamlined nature of arbitration by permitting the launching of collateral attacks." *Sander v. Weyerhaeuser Co.*, 966 F.2d 501, 503 (9th Cir. 1992). In *Sander*, it directed the entry of summary judgment against a plaintiff who "use[d] the guise of an independent suit" to press his contention that an arbitration award had been procured by fraud. *Id.* In *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986), it refused to permit a party to "collaterally attack" an arbitration award "under the guise of a motion [under Fed. R. Civ. P. 60(b)] to set aside the judgment confirming the award." 791 F.2d at 1339. "The [FAA] provides the exclusive grounds for challenging an arbitration award within its purview." *Id.* at 1338.

—The Tenth Circuit has held that the FAA "provides the exclusive remedy for challenging conduct that taints an arbitration award within the Act's coverage. . . . When, as here, a suit is in substance no more than a collateral attack on the award itself, it is governed by the provisions of the Act." *Foster v. Turley*, 808 F.2d 38, 41-42 (10th Cir. 1986).[9]

---

[9] *Accord Pisciotta v. Shearson Lehman Bros.*, 629 A.2d 520, 523-24 (D.C. 1993); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, Civ. A. 7177, 1988 WL 60380, *5-*6 (Del. Ch. June 14, 1988).

Under these decisions, Silver should have sought review pursuant to the California statute governing review of arbitration awards. Although the FAA applied because the retainer agreement between the Millers and Silver evidenced a transaction involving interstate commerce,[10] the proper vehicle for obtaining judicial review of the award was a petition to vacate filed in a California court pursuant to Cal. Civ. Proc. Code § 1286.2 (West Supp. 2003). State court was the proper forum because the FAA does not independently confer federal jurisdiction, *see Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984), and the arbitration involved state-law claims between citizens of the same state. A. 19a. The grounds for vacating an arbitrator's award specified in the California statute are similar to those set forth in the FAA. *Compare* Cal. Civ. Proc. Code § 1286.2 *with* 9 U.S.C. § 10(a).[11] Even assuming that the District Court could have exercised supplemental jurisdiction over a motion to vacate filed under the FAA, the court would have been confined to the grounds for review specified in the FAA and the case law interpreting it.

B. The Second and Fourth Circuits Permit Collateral Attacks on Arbitration Awards.

In contrast, the Second and Fourth Circuits have permitted parties unhappy with an arbitrator's award to pursue what is in substance a collateral attack on the award.

---

[10] *See* 9 U.S.C. § 2; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995) (holding that § 2 "signals an intent to exercise Congress' commerce power to the full").

[11] After the District Court had issued its injunction against enforcement of the awards of blue sky damages and attorney's fees, Silver ultimately did pursue a direct attack on the entire arbitration award, by filing a petition to vacate in state court. The petition was dismissed, however, because it was filed long after the 100-day time limit established by California law. *See Miller v. Silver*, No. G030054, 2003 WL 264758 (Cal. Ct. App. Feb. 10, 2003) (affirming dismissal).

In *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085 (2d Cir. 1993) (per curiam), the Second Circuit held that the failure of a party who had lost an arbitration "to move to vacate the arbitration award within the time prescribed by 9 U.S.C. § 12 does not prevent him from seeking to recover damages for alleged civil rights violations that occurred during the arbitration proceeding itself." 7 F.3d at 1086-87. The court ruled that the procedures established by the FAA, though "normally the exclusive remedy to challenge the results of an arbitration proceeding," *id.* at 1086, did not preclude a suit under federal civil rights laws for racial discrimination during the arbitration. *Id.* at 1087. "The fact that a major component of the damages sought would consist of the amount of the arbitration award—if the plaintiff can prove that but for the discrimination, the arbitrators would have ruled in his favor—does not mean that Mian's suit is one to challenge the award within the meaning of [the FAA]." *Id.*

Similarly, by allowing Silver to obtain an injunction against enforcement of the California arbitration award on entirely different grounds from those specified in the FAA and California law, the Fourth Circuit allowed a collateral attack on the award.

C. The Decisions Permitting Collateral Attacks Thwart the Central Purpose of Arbitration.

The decisions in two circuits permitting collateral attacks on arbitration awards are misguided. Whatever authority a court may have to prevent an arbitration from going forward, the situation is fundamentally different once an arbitration has been conducted and an award returned.[12] Courts should not

---

[12] *Cf. Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524 (1986) (holding inapplicable cases in which "the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action," because in *Parsons*

allow end runs around the procedures and grounds for review provided in the FAA and state arbitration statutes. Not only has this Court "generally declined to expand opportunities for collateral attack," *Heck v. Humphrey*, 512 U.S. 477, 485 (1994),[13] but the nature and purpose of arbitration make collateral attacks particularly objectionable.

Collateral attacks on arbitration awards strike at the heart of the bargain that parties make when they agree to arbitrate their disputes. A party who agrees upon arbitration "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). "[C]ourts must not reexamine the merits of an arbitral award . . . . Because arbitration is an *alternative* to the judicial resolution of disputes, this extremely low standard of review is necessary to prevent the judicialization of the arbitration process." *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1293 (9th Cir. 1987). As this Court admonished in summarily reversing a decision that had overturned an arbitration award,

> [C]ourts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim. When the judiciary does so, it usurps a function which . . . is entrusted to the arbitration tribunal.

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509-10 (2001) (per curiam) (citations & internal quotations omitted) (ellipses & insertion in original).

"respondents chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try").

[13] *See, e.g., D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482, 486 (1983) (holding that a federal district court could not entertain a constitutional challenge to a denial by the District of Columbia Court of Appeals of a request for waiver of a bar admission rule); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923) (similar holding).

When arbitration awards are reviewed in court pursuant to the FAA and state arbitration statutes, the risk of such impermissible weighing of the merits is minimized by the established—and extremely limited—standard of review. In keeping with the "national policy favoring arbitration," *Southland Corp.*, 465 U.S. at 10, "the standard of review of arbitral awards is among the narrowest known to the law." *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (quotation omitted). But when a court entertains a collateral attack launched without regard to that standard of review, the risk that it will improperly substitute its views for the arbitrator's is far greater.

The present case illustrates the dangers of permitting collateral attacks. Neither the Court of Appeals nor the District Court considered whether Silver could establish any of the grounds for relief available under the FAA or Cal. Civ. Proc. Code §1286.2. Indeed, the Court of Appeals predicated its ruling in part on a determination that directly contradicted a determination made by the arbitrator, contrary to this Court's directive that "courts . . . have no business weighing the merits" of the matter before the arbitrator. *Garvey*, 532 U.S. at 509 (quotation omitted).[14] The District Court observed that "arbitration awards are not sacrosanct and should not be enforced if to do so would violate public policy." A. 60a. But it did not decide whether Silver's objections to the award fit within the narrow bounds of the public-policy exception as construed by this Court. They clearly do not. *See E. Associated Coal Corp. v. UMW of Am., Dist. 17*, 531 U.S. 57, 62-63 (2000). And although both the District Court and the Court of Appeals criticized the Millers for purportedly

[14] The arbitrator had found that the Millers had not received compensation for their blue sky damages under the settlement, A. 26a, but the Court of Appeals found that they had been compensated for such damages. *Id.* 41a.

misleading the arbitrator, neither court considered the demanding standard that must be met to vacate an arbitration award based on fraud.[15]

Congress was not engaging in a mere verbal exercise when it prescribed procedures for challenging arbitration awards and grounds upon which awards could be vacated. It could not have intended that review pursuant to the FAA would be simply an alternative to other vehicles for obtaining federal judicial review of an arbitration award.

Collateral attacks also interfere with settled principles governing judicial *remedies* for errors in an arbitration proceeding. "Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings." *Garvey*, 532 U.S. at 511. The arbitrator can then correct the error, and the parties can still receive what they bargained for—a resolution of their dispute through arbitration. But a court entertaining a collateral attack is in no position to order a remand to the arbitrator. Here, the District Court simply barred enforcement of the arbitration award, without giving the arbitrator any opportunity to revisit the matter.

A collateral attack on an arbitration award is doubly improper when the arbitration was ordered by a state court, as occurred here. Arbitration is a critical method of resolving

---

[15] *See Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 161 F.3d 314, 319 (5th Cir. 1998), *adopting* 978 F. Supp. 266, 304 (S.D. Tex. 1997); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992); *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 35 (2d Cir. 1951). Silver could not have met the standard for overturning an award based on fraud, for the subject of the alleged misrepresentations—the nature of the damages awarded under the class action settlement—was one he was fully familiar with from his extensive participation in the class action. *See* note 4, *supra*. Indeed, in the arbitration Silver had called as witnesses no fewer than six attorneys (including himself) who had been involved in the class action. C.A. App. 966-67.

disputes and is relied upon by state judicial systems across the country. A sovereign state's interest in administering its statutory arbitration scheme is entitled to respect and deference; it should not be disregarded by a federal court that disagrees with the arbitrator's award. [16]

D. The Question Is Important.

The permissibility of collateral attacks on arbitration awards is a question of broad importance in light of the judicial system's increased reliance upon arbitration to relieve docket congestion and to provide a speedy means of deciding disputes. In § 2 of the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, Congress specifically found that voluntary arbitration and other forms of alternative dispute resolution "may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States." *See also* 28 U.S.C. §§ 651-658. This Court, too, has recognized the valuable role of arbitration, in the Court's many decisions in recent years that have eliminated or narrowed restrictions on its use. The Fourth Circuit's decision threatens to undermine the steps taken by Congress and this Court to promote arbitration. It is completely at odds with the liberal federal policy in favor of arbitration and should be reversed.

---

[16] Allowing collateral attacks on arbitration awards also invites forum-shopping. Here, Silver preferred to challenge the arbitration award not in the Superior Court of Orange County, which had ordered the arbitration on Silver's motion, but before the federal judge who had appointed him to the Plaintiffs' Executive Committee in the MDL proceedings and had dealt with him in that capacity.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GRUPO MEXICANO DE DESARROLLO, S.A. V. ALLIANCE BOND FUND, INC.*

This case also raises a significant issue about the reach of a recent decision of this Court, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In *Grupo Mexicano*, this Court ruled that, "[b]ecause such a remedy was historically unavailable from a court of equity," a federal court presiding over an action for money damages has "no authority to issue a preliminary injunction preventing [defendants] from disposing of their assets." *Id.* at 333. More broadly, the Court held that the jurisdiction over suits in equity conferred by the Judiciary Act of 1789 "'is an authority to administer in equity suits *the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.*'" *Id.* at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)) (emphasis added). As the Court explained,

> "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)."

527 U.S. at 318 (quoting A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)). Accordingly, this Court "ask[ed] . . . whether the relief respondents requested here was traditionally accorded by courts of equity." 527 U.S. at 319.

In the present case, the Court of Appeals ignored *Grupo Mexicano*—apparently because it deemed the District Court's injunction proper under the All Writs Act to "prevent the frustration of orders it has previously issued," *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977), A. 34a,

36a, rather than under Fed. R. Civ. P. 65, the rule relied upon for the injunction in *Grupo Mexicano*. *See* 527 U.S. at 318 & n.3. Had the Court of Appeals deemed *Grupo Mexicano* applicable, as petitioners had argued, it would have been obligated to vacate the injunction. First, in the English Court of Chancery, the absence of an adequate remedy at law was a basic requirement for equitable relief. *See id.* at 319; HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 21, at 46 (2d ed. 1948). Silver had an adequate remedy at law: review of the arbitration award in state court. Second, equity has long recognized that, "[i]f [the arbitrators] have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better." *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 352 (1854).[17] Third, "equity follows the law." *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893); *see Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853). Established legal principles under the FAA and state law control both the procedure for challenging arbitral decisions and the grounds for such challenges.

Both as a matter of *stare decisis* and as an initial matter, conformity with traditional principles of equity should be required just as much under the All Writs Act as under Rule 65.

---

[17] *See also Burchell*, 58 U.S. (17 How.) at 349:

> Arbitrators are judges chosen by the parties to decide the matter submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

A. *Grupo Mexicano* Held That the All Writs Act, Like Rule 65, Requires Application of Traditional Principles of Equity.

In *Grupo Mexicano*, the United States, as *amicus curiae*, specifically invoked the All Writs Act in support of the preliminary injunction. *See* 527 U.S. at 326 n.8 ("the United States suggests that there is statutory support for the present injunction in the All Writs Act"). This Court rejected the argument:

> [W]e have said that the power conferred by the predecessor of that provision is defined by "what is the usage, and what are the principles of equity applicable in such a case." *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 219 (1945). *That is the very inquiry in which we have engaged.*

527 U.S. at 326 n.8 (emphasis added). The clear import of this passage is that a federal court's equitable power under the All Writs Act, like its equitable power under Rule 65, is confined by traditional principles of equity.

B. The All Writs Act Is Properly Construed To Require Application of Traditional Principles of Equity.

In any event, the All Writs Act can be traced back to the Judiciary Act of 1789—the same Act relied upon by this Court in *Grupo Mexicano* in holding that federal courts must apply established principles of equity. *See* 527 U.S. at 319. The First Congress did not in one section of that Act require federal courts to honor established principles of equity and then, in the section of the same Act that was the predecessor of the All Writs Act, authorize those same courts to disregard those very principles.

Section 11 of the Judiciary Act, the provision referred to by this Court in *Grupo Mexicano* in stating its principal holding about the obligation of federal courts to apply traditional

equitable principles, "conferred on the federal courts jurisdiction over 'all suits . . . in equity.'" *Grupo Mexicano*, 527 U.S. at 318 (quoting 1 Stat. 73, 78) (omission in original). "The All Writs Act originally was codified in § 14 of the Judiciary Act . . . ," *Pennsylvania Bureau of Correction v. United States Marshals Service,* 474 U.S. 34, 40 (1985), which granted the federal courts "power to issue . . . all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. 73, 81-82.[18] It would be unreasonable to conclude that the First Congress intended to bind the federal courts to traditional equitable principles in § 11, but to leave them free to roam at large when issuing injunctions under § 14.

Grupo Mexicano is not the only decision of the Court demonstrating that a federal court's powers under the All Writs Act are limited by the basic principles applied by courts in England in the late eighteenth century. In *Carlisle v. United States,* 517 U.S. 416 (1996), the Court rejected a claim that the All Writs Act allowed a court to enter a judgment of acquittal, through a writ of *coram nobis*, despite noncompliance with the time limits of Fed. R. Crim. P. 33. One of the Court's rationales was that the writ of *coram nobis* "would not have lain here, since it was *traditionally available* only to bring before the court factual errors 'material to the validity and regularity of the legal proceeding itself.'" 517 U.S. at 429 (emphasis added) (quoting *United States v. Mayer*, 235 U.S. 55, 68 (1914)).[19] In *De Beers,* after noting

---

[18] Minor changes were made in the 1948 consolidation of two separate provisions into what is now 28 U.S.C. § 1651, but "the 1948 changes in phraseology do not mark a congressional expansion of the powers of federal courts to authorize issuance of any 'appropriate' writ." *Pa. Bureau of Corr.*, 474 U.S. at 42.

[19] *Mayer* discussed the writ of *coram nobis* as employed by "courts of common law." 235 U.S. at 67; *see also id.* at 68 (citing English treastises).

that the Sherman Act "confers no new or different power than those traditionally exercised by courts of equity," 325 U.S. at 219, the Court made clear that that was also true of the All Writs Act. *Id.* And in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Court declared that "[t]he All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Id.* at 537.

C. *New York Telephone* Does Not Permit Federal Courts To Issue Injunctions Under the All Writs Act Without Regard to Established Principles of Equitable Relief.

The Court of Appeals relied upon this Court's statement in *New York Telephone*, 434 U.S. at 172, that the All Writs Act empowers a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." A. 33a-34a. That statement, however, does not give federal courts *carte blanche* to issue injunctions without consideration of traditional principles of equitable relief.

The question in *New York Telephone* was simply whether a federal court could compel a third party, a telephone company, to assist the FBI, pursuant to a warrant, in installing devices that would register the numbers dialed on certain telephones. The United States had no adequate remedy except for such assistance. "[W]ithout the Company's assistance there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished." 434 U.S. at 175. *New York Telephone* is thus not authority for issuing injunctions without regard to the existence of an adequate remedy at law.

Nor, since it involved a writ that imposed a burden only on the telephone company (which was to be compensated for its efforts, *see id.* at 161), is it authority for issuing injunctions

without regard to the respect due state courts (and arbitrators hearing disputes that state courts have ordered arbitrated). Among the powers not surrendered to the national government but reserved to the States is "the maintenance of state judicial systems for the decision of legal controversies." *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970).

> [T]he Constitution . . . recognizes and preserves the autonomy and independence of the States . . . in their judicial departments. Supervision over . . . the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference . . . , except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.

Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) (quotation omitted). The independence of state courts is essential to our system of federalism and protected by the Tenth Amendment. The states' prerogative to administer their court systems demands that, when an injunction is sought to preclude a petition to a state court to confirm an award in an arbitration ordered by the state court, the request cannot be judged by the same standard applicable to a request for a writ requiring a telephone company to provide technical assistance. "[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). Adequacy of state-court remedies must be presumed even when the party seeking federal intervention is pressing contentions under the Constitution. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Surely the adequacy of such remedies also must be presumed when a party is seeking to bar enforcement of an arbitrator's resolution of a state-law claim, based on the party's assertion

about a settlement agreement which only released claims against other parties and provides that its interpretation is governed by state substantive law. C.A. App. 524.

With respect to arbitration awards in particular, the FAA and state arbitration statutes prescribe specific procedures and substantive standards of review. This Court has held that, "'[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 369 (2002) (quoting *Pa. Bureau of Corr.*, 474 U.S. at 43). The All Writs Act "does not authorize . . . ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr.*, 474 U.S. at 43. In *New York Telephone* itself, the Court reasoned that federal courts could act under the All Writs Act "'*[u]nless appropriately confined by Congress.*'" 434 U.S. at 172-73 (emphasis added) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). The Court should clarify that neither traditional principles of equity, nor the rule that a statute specifically addressing the matter is controlling, can be disregarded merely because an arbitration award, or a state court order, is thought to "frustrate" a prior order of the federal court.

D. The Question Is Important.

Whether federal courts must respect traditional principles of equitable relief, in exercising their equitable power under the All Writs Act, is a significant question of federal law. By its express terms the All Writs Act applies to "all courts established by Act of Congress." The Act may be invoked in all manner of cases, including ordinary civil cases, administrative cases, criminal cases, and bankruptcy cases. Whether federal courts are or are not obligated to apply traditional equitable principles should be definitively resolved.

It is likewise essential to make clear that a federal court's authority under *New York Telephone* to "prevent the frustration of orders it has previously issued," 434 U.S. at 172, is not a license to issue writs without regard to traditional principles of equitable relief or statutory provisions specifically addressing the issue at hand. The Court recently rejected one of the outgrowths of *New York Telephone*—the many lower court decisions that had allowed removal of cases to federal court under the All Writs Act. *See Syngenta*, 123 S. Ct. at 369-70. In his concurring opinion in *Syngenta*, Justice Stevens wrote that "the overly expansive interpretation given to the All Writs Act in *New York Telephone* may produce further mischief," and urged that the decision be overruled. *Id.* at 371; *see also* Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1577 (2000) (observing that *New York Telephone* "set forth a broad construction of the All-Writs Act"). Here, the *New York Telephone* opinion has indeed produced further mischief: an injunction against enforcement of an award in an arbitration that had been ordered by a state court, on the motion of the very parties later seeking the injunction. And there are many other decisions, having nothing to do with removal, in which *New York Telephone* has likewise led to highly suspect interference with state judicial systems.[20] Limiting *New York Telephone* would eliminate a major source of confusion as to the power of the federal courts.

---

[20] *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985); *In re Columbia/HCA Healthcare Corp.*, 93 F. Supp. 2d 876, 881 (M.D. Tenn. 2000); *Elec. Data Sys. Corp. Iran v. Soc. Sec. Org. of Iran*, 508 F. Supp. 1350, 1358 (N.D. Tex. 1981); *see generally* Vairo, *supra*, at 1578-84.

III. FEDERAL COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OVER DISPUTES BETWEEN SETTLING CLASS MEMBERS AND ANY THIRD PARTY WHO RAISES A DEFENSE OF DOUBLE RECOVERY.

Finally, this Court should review the Fourth Circuit's decision because it confers a broad new authority upon federal courts approving class action settlements. Now, simply by announcing that it is retaining exclusive jurisdiction to interpret and implement the settlement agreement, a federal judge acquires a sweeping power to nullify state-court-ordered arbitrations between class members and third parties—even arbitrations involving state-law claims between citizens of the same state. To invoke that power, the third parties need only contend that the damages awarded by the arbitrator could not have been recovered from parties released in the class action settlement, under a proper interpretation of the settlement agreement. The Fourth Circuit's ruling greatly expands federal judicial authority, for federal courts routinely retain jurisdiction to interpret class action settlement agreements, and classes often have thousands or even tens or hundreds of thousands of members, many of whom may pursue claims against third parties. This enlargement of exclusive federal jurisdiction constitutes a completely unwarranted abrogation of state sovereignty.

Even as to claims arising under *federal* law, exclusive federal jurisdiction is "the exception rather than the rule," *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962), and is created only when Congress acts to preclude state courts from exercising jurisdiction:

> Under our "system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." To give federal courts exclusive jurisdiction

> over a federal cause of action, *Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.*

Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) (emphasis added) (citations omitted) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

In this case, however, the Fourth Circuit held that a sovereign state lacked jurisdiction to decide, in its own courts and in an arbitration ordered by one of those courts, a claim under *its own laws*. The Fourth Circuit so held despite the absence of any action by Congress remotely supporting such a divestiture of state-court jurisdiction. And the claim of exclusive federal jurisdiction had never been presented either in state court or before the arbitrator; indeed, it was the party later claiming exclusive federal jurisdiction who had moved to compel arbitration in the first place. The Fourth Circuit's ruling disregards "the autonomy and independence of the States . . . in their judicial departments," *Erie*, 304 U.S. at 78-79 (quotation omitted), and is truly inexplicable.

To the extent that federal courts are entitled to retain exclusive jurisdiction to interpret and implement a class action settlement agreement, such jurisdiction necessarily is limited to such matters as disputes between the parties to the settlement about its meaning, or disputes about whether particular claims were released in the settlement. It has never been thought to give a federal court roving authority to intervene in state-law disputes between class members and third parties about conduct (in the present case, alleged legal malpractice in a state-court action) that did not occur in the class action and was neither at issue in the class action nor addressed in the settlement.

Nor did Silver's argument to the arbitrator, that the Millers had been compensated for overpaying for the dealership when they recovered damages under the class action settlement for

misallocation of vehicles, remotely bring the Millers' state-law malpractice claim within the District Court's exclusive jurisdiction. The arbitrator was fully capable of evaluating Silver's argument, and the Superior Court of Orange County was fully capable of reviewing the arbitrator's award. It is not at all unusual for a defendant to contend that damages sought by the plaintiff would confer a double recovery of damages previously awarded in another action. The mere presentation of such a contention certainly does not mean that the second decisionmaker is impinging upon the prior court's jurisdiction, or entitle the defendant to seek an injunction from that court. *See, e.g., Jos. L. Muscarelle, Inc. v. Cent. Iron Mfg. Co.*, 328 F.2d 791, 794 (3d Cir. 1964) (holding in-aid-of-jurisdiction exception to Anti-Injunction Act inapplicable because alleged risk of double liability "would not make the questioned injunction in aid of any jurisdiction which has been invoked and is being exercised in this suit").

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

BARRY S. SIMON
PAUL MOGIN *

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioners

Of Counsel:

HERBERT J. PATT
ANDRES & ANDRES
2041 North Main Street
Santa Ana, CA 92706

* Counsel of Record

May 15, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-2194, 01-2229

In re AMERICAN HONDA MOTOR COMPANY, INCORPORATED, DEALERSHIPS RELATIONS LITIGATION

ROGER MILLER; RUTH MILLER,
Plaintiffs-Appellants,

and

Bernardi's Incorporated, d/b/a Bernardi Honda, a Massachusetts Corporation (JFM-95-3314); Pye Automobile Sales, Incorporated, (JFM-99-3136); Richard C.D. Hunt, III, (JFM-94-3499); Peggy Hunt, (JFM-94-3499); Rick Hunt Ford, Incorporated, (JFM-94-3499); Robert J. Vatland, (JFM-95-2415); Metro Auto, Incorporated, d/b/a, Metro Honda, (JFM-95-2493) formerly; Dominick Rocco, (JFM-95-2493); Shirley Rocco, (JFM-95-2493); Flynn Motors, Incorporated, d/b/a American Honda of Hammonton, (JFM-95-2494); John J. Flynn, Jr., (JFM-95-2494); Jane Mendelsohn, a/k/a Robert W. Mendelsohn, Solely in her Capacity as Executrix of the Estate of (JFM-95-2494); Robbin Lindsay Toresco, (JFM-95-2495); Jack Revelle, (JFM-95-2517); Rochester World Car Corporation, (JFM-95-2517); Liverpool World Car Corporation, d/b/a Honda City, (JFM-95-2517); Bill McDavid Pontiac, GMC Trucks, Honda, Incorporated, d/b/a Bill McDavid Honda, (JFM-95-2584); Bill McDavid Motors, Incorporated, d/b/a Bill McDavid Acura of Arlington, (JFM-95-2584); Bill McDavid, Incorporated, d/b/a Bill McDavid Acura of Fort Worth; Vic Bailey Honda, Incorporated,

(JFM-95-2598); Claudia Close, d/b/a Jim Close House of Honda, d/b/a House of Honda, as Executrix of the Estate of James R. Close, Humphrey Motors, Inc.; Humphrey Motors, Incorporated, a/k/a Jim Close House of Honda, a California Corporation (JFM-95-2713); Sierra Motors, Incorporated, d/b/a Sierra Motors, Incorporated, a Nevada Corporation (JFM-95-2712); James Mckoane Enterprises, Incorporated, d/b/a Clawson Honda of Fresno, a California Corporation (JFM-95-2728); Breakaway Incorporated, d/b/a Breakaway Honda, a South Carolina Corporation (JFM-95-2804) (JFM-95-2728); Century Lincoln-Mercury, Incorporated, a South Carolina Corporation (JFM-5-2728); International Motor Works, Incorporated, d/b/a Honda Motor Works, a Wisconsin Corporation (JFM-95-3043); Austin Motors, Incorporated, d/b/a Honda City, a New York Corporation (JFM-95-3044); Stafford Honda, Incorporated, a Texas Corporation (JFM-95-3045); City Motors Sales Company, a New Jersey Corporation (JFM-95-3046); Pace Oldsmobile, Incorporated, d/b/a Pace Honda, a New York Corporation (JFM-95-3047); Autosport, Incorporated, a New Jersey Corporation (JFM-95-3048); Pensacola Auto Mart, Incorporated, a Florida Corporation (JFM-95-3065); Frank Borman, Col., a New Mexico Resident (JFM-95-2716); Fred Borman, a North Carolina Resident (JFM-95-2716); Jeff Connole, d/b/a Borman Motor Company, a New Mexico Resident, Individually and Doing Business as (JFM-95-2716); William M. Van Dalsen, a California Resident (JFM-95-2716); William J. Bronson, an Oregon Resident (JFM-95-2716); Al Reilly, a California Resident (JFM-95-2716); Mildred Rader, d/b/a Pioneer Honda, a California Resident, individually and on behalf of all others similarly situated (JFM-95-2716); Borman Motor Company, Limited Liability Company, (JFM-95-2716); Precision Imports of Farmington, Incorporated, a New Mexico Corporation (JFM-95-2714); Rancourt, Incorporated, d/b/a Carmichael

Honda, (JFM-95-2715); Trans Oceanic Motors, Incorporated, d/b/a Cardinal Honda, (JFM-95-2695); Clair International, Incorporated, d/b/a Clair Honda, (JFM-95-3315); Clair's Incorporated, d/b/a Clair Acura, (JFM-95-3315); James E. Clair, (JFM-95-3315); Richard Lundgren, Incorporated, d/b/a Lundgren Honda, a Massachusetts Corporation (JFM-95-3313); Bill Krause Automotive, Incorporated, a California Corporation (JFM-95-3414); William A. Krause, (JFM-95-3414); Sawyer Auto Imports, Incorporated, a Delaware Corporation (JFM-95-3417); Bay Ridge Honda, a New York Corporation (JFM-95-3418); Rensselaer Auto Plaza, Incorporated, d/b/a Rensselaer Honda, (JFM-95-3416); Romor Investments, Incorporated, Formerly Crown Motors which did business as Century Motors, a California Corporation (JFM-95-3729); Cooper, Incorporated, d/b/a Selma Honda, a dissolved California Corporation (JFM-95-53); Miller Auto Sales, Incorporated, d/b/a Miller Honda-Volkswagon-Isuzu-Suzuki, a Virginia Corporation (JFM-96-382); Kachina Investments, Incorporated, a/k/a Wayne L. Culiver, a/k/a Wanyne Culliver Ford, Incorporated, a/k/a Hacienda Motor Company, Incorporated, an Arizona Corporation, as successor in interest to (JFM-96-602); BLW, Incorporated, d/b/a Luby Chevrolet Company, Incorporated, formerly (JFM-96-637); Fairfield Motors, Incorporated, a New Hampshire Corporation (JFM-96-1438); Jack Brown Imports, Incorporated, an Illinois Corporation (JFM-96-1506); Sierra Auto Cars, Incorporated, d/b/a Sierra Honda, a California Corporation (JFM-96-1504); Pomona Valley Imports, Incorporated, a California Corporation (JFM-96-1504); Majestic Pontiac, d/b/a Majestic Honda, d/b/a Majestic Pontiac & Honda, a California Corporation (JFM-96-1504); Kaiser Brothers, d/b/a Kaiser Brothers Oldsmobile & Honda, a California Corporation (JFM-96-1504); Bob Jackson & Son, d/b/a Honda Santa Ana, a California Corporation (JFM-96-1504); Community

Pontiac, d/b/a Community Pontiac Honda, d/b/a Community Honda, a California Corporation (JFM-96-1054); Nelson Pontiac, d/b/a Nelson Honda, a California Corporation (JFM-96-1504); Otobai Incorporated, d/b/a Honda of Pasadena, a California Corporation (JFM-96-1504); John Bryant Motors, d/b/a Bryant Honda, a California Corporation (JFM-96-1504); Vinci, Incorporated, d/b/a Las Vegas Honda, a Nevada Corporation (JFM-96-1504); Stewart Olds, Incorporated, d/b/a Stewart Honda, a California Corporation (JFM-96-1504); Goodwin Motors, Incorporated, d/b/a Goodwin Honda, a California Corporation (JFM-96-1504); Garsten Motors, Incorporated, d/b/a Garsten Honda, a New York Corporation (JFM-96-1507); June Jensen, (JFM-96-1505); Byrnes-McCarthy, Incorporated, a New Hampshire Corporation (JFM-96-1724); Paradise Pontiac, Incorporated, an Ohio Corporation (JFM-96-1702); Nault Enterprises, Incorporated, d/b/a Nault's Honda, a New Hampshire Corporation (JFM-96-1774); James Mckoane Enterprises, Incorporated, a California Corporation (JFM-96-1915); Hardin Oldsmobile, d/b/a Hardin Honda, a California Corporation (JFM-96-1838); Rule, Incorporated, d/b/a Rule Honda, a Virginia Corporation (JFM-96-2757); Coastal Imports, Incorporated, d/b/a Vista Honda 126 East, a California Corporation (JFM-96-2758); International Automobiles, Incorporated, a New Jersey Corporation (JFM-96-2778); Philip Winter, an Oregon Resident (JFM-96-2716); Frederick H. Powell, (JFM-96-1489); Powell's Auto Center, Incorporated, (JFM-96-1489); G. Marshall Butler, (JFM-96-3447); M. Butler, Incorporated, (JFM-96-3447); PHC Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); First International Motors Incorporated and Successor in interest to D'Imports, Incorporated, d/b/a D'Honda, a California Corporation (JFM-96-3743); Porter Chevrolet, Incorporated, (JFM-96-3893); Clarence B. Smail, an individual (JFM-96-3932); James A. Small, an

individual (JFM-96-3932); Bud and Jim Small, Incorporated, a Pennsylvania Corporation (JFM-96-3932); Johnson Motor Company, Incorporated, d/b/a Johnson Honda-Nissan, an Ohio Corporation (JFM-96-726); D & C Chevrolet Company, d/b/a D & C Honda, a New Jersey Corporation in case (JFM-96-3858); Bill Rule, Incorporated, d/b/a Honda Nissan of Covington, a Virginia Corporation (JFM-96-4026); Woodson Pontiac, Incorporated, d/b/a Richard Woodson Honda, a Virginia Corporation (JFM-97-186); Alvin's Enterprises, Incorporated, d/b/a Alvin's Honda Sales, a Pennsylvania Corporation (JFM-97-201); Colonial Limited, Incorporated, d/b/a Colonial Honda; S & R Auto Sales, Incorporated, d/b/a Roger Miller Honda of Huntington Beach, a California Corporation; Roger Miller Imports, Incorporated, d/b/a Roger Miller Acura of Beverly Hills, a California Corporation; Beverly Hills R & R, Incorporated, d/b/a Roger Miller Honda of Beverly Hills; C.H. Jorgensen, d/b/a Jorgensen's Honda, a corporation (JFM-97-1624); Yonkers Motors Corporation, d/b/a Yonkers Motors, a New York Corporation (JFM-95-3271); Joy Libert Gelb, (JFM-95-3271) Yonkers Motors Corporation; Bill Edwards Oldsmobile, Incorporated, a Virginia Corporation (JFM-97-2945); William Edwards, Sr., (JFM-97-2945); William Edwards, Jr., (JFM-97-2945); Klein Foreman Motors, Incorporated, d/b/a Foreman Honda, a California Corporation (JFM-97-852); Frahm Honda, a California Corporation (JFM-97-3006); Gene Gabbard, Incorporated, d/b/a Gene Gabbard Lincoln Mercury, d/b/a Gene Gabbard's Stockton Lincoln Mercury Honda, a California Corporation (JFM-97-3224); Gene Gabbard, (JFM-97-3224); James Gabbard, (JFM-97-3224); Gary Gabbard, (JFM-97-3224); Harvey & Madding, Incorporated, d/b/a Dublin Honda, a California Corporation (JFM-97-3212); Harvey & Sons, Incorporated, d/b/a Hayward Acura, a California Corporation (JFM-97-3212);

Ken 3212); Harvey & Sons, Incorporated, d/b/a Hayward Acura, a California Corporation (JFM-97-3212); Ken Harvey, (JFM-97-3212); Harry Cramer Honda; Stanford A. Cramer, individually in JFM-97-1330; WPS, Incorporated, d/b/a Honda Cars of Columbia, JFM-97-1288; Dorothy Van Dalsem, as Executrix of the Estate of William M. Van Dalsem (JFM-95-2716); Colonial Limited, Incorporated, d/b/a Colonial Honda, a California Corporation (JFM-97-1136); Balise Motor Sales Company, d/b/a Balise Honda, a Massachusetts Corporation (JFM-98-1286); Barr Motors, Incorporated, d/b/a Barr Honda, a Pennsylvania Corporation (JFM-98-1299); Steve Hopkins, Incorporated, a California Corporation (JFM-98-1497); Larry Hopkins, Incorporated, a California Corporation (JFM-98-1497); Steve Hopkins, a California Resident (JFM-98-1497); Menard & Holmberg, Incorporated, d/b/a Menard & Holmberg Honda/Isuzu, a Massachusetts Corporation (JFM-98-933); Pioneer Edsel Sales, Incorporated, d/b/a Pioneer Honda, Honda, a California Corporation (JFM-98-828); South City, Incorporated, d/b/a South City Honda, a California Corporation (JFM-98-1023); Ed Wittmeier Ford, Incorporated, d/b/a Wittmeier Honda, a California Corporation (JFM-98-1025); Sherwood Imports, Incorporated, d/b/a Sherwood Honda, (JFM-98-1755); Tamaroff Buick, Incorporated, d/b/a Tamaroff Honda, (JFM-98-1756); Leslie Segel, an Oregon Resident (JFM-98-2315); Segel Enterprises, Incorporated, d/b/a Town & Country Cadillac Oldsmobile Honda, a California Corporation (JFM-98-2315); Frank Mitchell, JFM-98-2438; Jay Mitchell, a California Resident (JFM-98-2438); B-J Marchese Motor Company, a Pennsylvania Corporation (JFM-98-2812); B.J. Marchese Honda, (JFM-98-2812); B.J. Marchese, (JFM-98-2812); Marshall Chevrolet, Volvo, Honda, Incorporated, a Pennsylvania Corporation (JFM-98-3821); Henry C. Marshall, individually (JFM-98-3821); Globe

Auto Imports, d/b/a Globe Honda, a Florida Corporation (JFM-98-4064); James McFrederick, a Florida Resident (JFM-98-4064); Cale Yarborough Motors of South Carolina, Incorporated, d/b/a Cale Yarborough Honda-Mazda, (JFM-98-1828); Cale Yarborough Motors of GA, Incorporated, d/b/a Cale Yarborough Honda, (JFM-98-1827); Goodwin Volkswagen, Incorporated, d/b/a Goodwin Honda; Alan L. Strouse; Clovis Honda,

Plaintiffs,

v.

Richard H. Brooks; Stanley James Cardiges; Hugh P Cooper; Dennis R. Josleyn; Robert N. Rivers; Robert A. Mazatelli; Edward A. Temple; Blakely Consultants & Development, Incorporated; Honda Motor Company, Ltd.; Raymond W. Hovsepian; Common-Wealth Insurance Company; John W. Billmyer; Roger Novelly; Richard Ditaranto; Does 1-50; Koichi Amemiya; Yoshide Munekuni; Mark L. Benson; Damien C. Budnick; David L. Pedersen; Thomas A. Caulfield, a California Resident; John J. Conway, a New Jersey Resident; Lyon & Lyon, a California Partnership; Roland N. Smoot, a California Resident; Frederick W. Meis, Jr., a Texas Resident; Frank Pisano, a Colorado Resident; Beatrice Sikora; Larry C. Finley; Peter Epsteen; Joseph R. Hendrick, III, a North Carolina Resident; Angelo Falconi, a Pennsylvania Resident; Cliff Peck; John Rosatti; William Schuiling; Joseph Pope, a California Resident; Shau Wai Lam, a New Jersey Resident; Henry Khachaturian, d/b/a Hank Torian, a California Resident; Mid Peninsula Motors, Incorporated, a California Corporation; Auto Car, Incorporated, a California Corporation; Edgren Motors, Incorporated, a California Corporation; Martin Lustgarten; Does 1-100, Inclusive; John L. Hendrick, a North Carolina Resident; Hendrick Automotive Group, a North Carolina Corporation; Dah Chong Hong, Ltd., a California Corporation; Dah Chong

Hong Trading Corporation, a/k/a DCH, a New York Corporation; Honda North America, Incorporated; Hendrick Management Corporation; L.L.L. Sales Company, Incorporated; DCH (Oxnard) Incorporated; David Mcdavid; Vincent Piazza; Santo George Poling; J.R.H., Incorporated; William O. Musgrave; Charles V. Ricks; Wesh, Incorporated; Canyon Honda, a California Corporation; Canyon Acura, a California Corporation; Rick Hines, an Individual; Corona Honda, a California Corporation; David Conant; Virginia's First Family Of Fine Cars Incorporated, d/b/a Brown Oldsmobile Honda Saab, a Virginia Corporation; Al Sheng, an Individual; Earl Pilcher, (JFM-96-3447); B.D.A. Enterprises Corporation, formerly known as Town & Country Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); Barry Alexander, (JFM-96-3448); Rick Hendrick, a New Jersey Resident (JFM-96-3858); Lyon & Lyon, a California Partnership; Roland N. Smoot, a California Resident; NFI Incorporated, a Corporation (JFM-96-4026); Bird, Bethea, Jordan & Griffin, P.A.; Irving H. Laserow, JFM-95-2492 Metro Auto, Incorporated; I.H. Laserow and Company, P.C., JFM-95-2493 Metro Auto, Incorporated; Edwin R. Taylor; Does 8-50; Tasha, Incorporated; Rick Hendrick Honda Cars Company, JFM-97-1288; Tower H. Ltd.; DCH Investments, Incorporated, (California); Civic Center Motors, Ltd., d/b/a White Plains Honda, a New York Corporation; 31-37 North Moore Street Corporation; Rick Heinz, Hardin Oldsmobile JFM-96-1838; Paul T. Bohlander; Sunshine Honda; Richard H. Brooks; Clarence Fincher; Tetsuo Chino, Former California Resident and now residing in the Nation of Japan; Hendrick Manage-Ment Company Limited Partnership; Hendrick Corporation; Hendrick Automotive Group; Hendrick Management Corporation; Thomas Del Franco; William Kutchera; James A. Thompson, a Florida Resident; Linda Lustgarten, a Pennsylvania Resident; Scott Lustgarten, a

Pennsylvania Resident; Classic Auto Group, Incorporated, a New Jersey Corporation; Scott Imports, Incorporated, d/b/a Main Line Honda, a Pennsylvania Corporation; Martin Newark Dealer-Ships, Incorporated, d/b/a Martin Honda, a Delaware Corporation; The Ted Stevens Car Company, Incorporated, a California Corporation; Theodore J. Stevens, a California Resident; White Plains Honda, a New York Sole Proprietorship; Paul Singer; John D'Elia,

Defendants,

American Honda Motor Company, Incorporated,
Defendant & Third Party Plaintiff,

v.

Lawrence Silver; Silver & Field,
Movants-Appellees,

and

Middletown Motors, Incorporated; Richard Catena; Imports of Freehold, Incorporated; Grand Motor Car Company, Incorporated; R.C. Caldwell Imports, Incorporated; David Trainer; Hollywood Imports Limited; Plaza Motors of Brooklyn, Incorporated; Hempstead Motors, Limited; North Palm Imports, Limited; Crytal Bay Imports, Limited; Paramus World Motors, Incorporated; Daron Motors, Incorporated; DCH Motors, Incorporated; DCH Manhattan; Stephen S. Bird; Bethea, Jordan & Griffin, P.A.; John W. Billmyer; S. James Cardiges; Robert A. Mazzitelli; Roger Novelly; Damien C. Budnick; David L. Pedersen; Mark L. Benson; John J. Conway; Clarence Fincher; Johnny R. Fincher; William Vince; Wayne Vince; W. Rodman Ryan; William Lia, Jr.; Don Lia; Dennis R. Josleyn; Hugh P Cooper; Robert N. Rivers; Frederick W. Meis, Jr.; Beatrice Sikora; William Schuiling; David Trainor; Santo George Poling; Vincent Radley; Karen Radley; Frank Pisano; Larry C. Finley; Thomas A.

Caulfield; Peter Epsteen; Hendrick Corporation; Angelo Falconi; Mid-Peninsula Motors, Incorporated; Auto Car, Incorporated; Edgren Motor Company; Don Carlton; Richard Catena; John Rosatti; Dah Chong Hong, Ltd.; L.L.L. Sales Company, Incorporated; DCH (Oxnard) Incorporated; Raymond Hovsepian; Irving H. Laserow; I.H. Laserow and Company, P.C.,

Third Party Defendants.

In Re American Honda Motor Company, Incorporated, Dealerships Relations Litigation

Roger Miller; Ruth Miller,

Plaintiffs-Appellants,

and

Bernardi's Incorporated, d/b/a Bernardi Honda, a Massachusetts Corporation (JFM-95-3314); Pye Automobile Sales, Incorporated, (JFM-99-3136); Richard C.D. Hunt, III, (JFM-94-3499); Peggy Hunt, (JFM-94-3499); Rick Hunt Ford, Incorporated, (JFM-94-3499); Robert J. Vatland, (JFM-95-2415); Metro Auto, Incorporated, d/b/a Metro Honda, (JFM-95-2493) Formerly; Dominick Rocco, (JFM-95-2493); Shirley Rocco, (JFM-95-2493); Flynn Motors, Incorporated, d/b/a American Honda of Hammonton, (JFM-95-2494); John J. Flynn, Jr., (JFM-95-2494); Jane Mendelsohn, a/k/a Robert W. Mendelsohn, solely in her capacity as Executrix of the Estate of (JFM-95-2494); Robbin Lindsay Toresco, (JFM-95-2495); Jack Revelle, (JFM-95-2517); Rochester World Car Corporation, (JFM-95-2517); Liverpool World Car Corporation, d/b/a Honda City, (JFM-95-2517); Bill McDavid Pontiac, GMC Trucks, Honda, Incorporated, d/b/a Bill McDavid Honda, (JFM-95-2584); Bill McDavid Motors, Incorporated, d/b/a Bill McDavid Acura of Arlington, (JFM-95-2584); Bill McDavid, Incorporated, d/b/a Bill McDavid Acura of Fort

Worth; Vic Bailey Honda, Incorporated, (JFM-95-2598); Claudia Close, d/b/a Jim Close House of Honda, d/b/a House of Honda, as Executrix of the estate of James R. Close, Humphrey Motors, Inc.; Humphrey Motors, Incorporated, a/k/a Jim Close House of Honda, a California Corporation (JFM-95-2713); Sierra Motors, Incorporated, d/b/a Sierra Motors, Incorporated, a Nevada Corporation (JFM-95-2712); James McKoane Enterprises, Incorporated, d/b/a Clawson Honda of Fresno, a California Corporation (JFM-95-2728); Breakaway Incorporated, d/b/a Breakaway Honda, a South Carolina Corporation (JFM-95-2804) (JFM-95-2728); Century Lincoln-Mercury, Incorporated, a South Carolina Corporation (JFM-95-2728); International Motor Works, Incorporated, d/b/a Honda Motor Works, a Wisconsin Corporation (JFM-95-3043); Austin Motors, Incorporated, d/b/a Honda City, a New York Corporation (JFM-95-3044); Stafford Honda, Incorporated, a Texas Corporation (JFM-95-3045); City Motors Sales Company, a New Jersey Corporation (JFM-95-3046); Pace Oldsmobile, Incorporated, d/b/a Pace Honda, a New York Corporation (JFM-95-3047); Autosport, Incorporated, a New Jersey Corporation (JFM-95-3048); Pensacola Auto Mart, Incorporated, a Florida Corporation (JFM-95-3065); Frank Borman, Col., a New Mexico Resident (JFM-95-2716); Fred Borman, a North Carolina Resident (JFM-95-2716); Jeff Connole, d/b/a Borman Motor Company, a New Mexico resident, individually and doing business as (JFM-95-2716); William M. Van Dalsen, a California Resident (JFM-95-2716); William J. Bronson, an Oregon Resident (JFM-95-2716); Al Reilly, a California Resident (JFM-95-2716); Mildred Rader, d/b/a Pioneer Honda, a California Resident, individually and on behalf of all others similarly situated (JFM-95-2716); Borman Motor Company, Limited Liability Company, (JFM-95-2716); Precision Imports of Farmington, Incorporated, a New Mexico Corporation

(JFM-95-2714); Rancourt, Incorporated, d/b/a Carmichael Honda, (JFM-95-2715); Trans Oceanic Motors, Incorporated, d/b/a Cardinal Honda, (JFM-95-2695); Clair International, Incorporated, d/b/a Clair Honda, (JFM-95-3315); Clair's Incorporated, d/b/a Clair Acura, (JFM-95-3315); James E. Clair, (JFM-95-3315); Richard Lundgren, Incorporated, d/b/a Lundgren Honda, a Massachusetts Corporation (JFM-95-3313); Bill Krause Automotive, Incorporated, a California Corporation (JFM-95-3414); William A. Krause, (JFM-95-3414); Sawyer Auto Imports, Incorporated, a Delaware Corporation (JFM-95-3417); Bay Ridge Honda, a New York Corporation (JFM-95-3418); Rensselaer Auto Plaza, Incorporated, d/b/a Rensselaer Honda, (JFM-95-3416); Romor Investments, Incoporated, Formerly Crown Motors which did business as Century Motors, a California Corporation (JFM-95-3729); Cooper, Incorporated, d/b/a Selma Honda, a disolved California Corporation (JFM-95-53); Miller Auto Sales, Incorporated, d/b/a Miller Honda-Volkswagon-Isuzu-Suzuki, a Virginia Corporation (JFM-96-382); Kachina Investments, Incoporated, a/k/a Wayne L. Culiver, a/k/a Wanyne Culliver Ford, Incorporated, a/k/a Hacienda Motor Company, Incorporated, an Arizona Corporation, as successor in interest to (JFM-96-602); BLW, Incorporated, d/b/a Luby Chevrolet Company, Incorporated, formerly (JFM-96-637); Fairfield Motors, Incorporated, a New Hampshire Corporation (JFM-96-1438); Jack Brown Imports, Incorporated, an Illinois Corporation (JFM-96-1506); Sierra Auto Cars, Incorporated, d/b/a Sierra Honda, a California Corporation (JFM-96-1504); Pomona Valley Imports, In-Corporated, a California Corporation (JFM-96-1504); Majestic Pontiac, d/b/a Majestic Honda, d/b/a Majestic Pontiac & Honda, a California Corporation (JFM-96-1504); Kaiser Brothers, d/b/a Kaiser Brothers Oldsmobile & Honda, a California Corporation (JFM-96-1504); Bob Jackson & Son, d/b/a Honda Santa Ana, a California

Corporation (JFM-96-1504); Community Pontiac, d/b/a Community Pontiac Honda, d/b/a Community Honda, a California Corporation (JFM-96-1054); Nelson Pontiac, d/b/a Nelson Honda, a California Corporation (JFM-96-1504); Otobai Incorporated, d/b/a Honda of Pasadena, a California Corporation (JFM-96-1504); John Bryant Motors, d/b/a Bryant Honda, a California Corporation (JFM-96-1504); Vinci, Incorporated, d/b/a Las Vegas Honda, a Nevada Corporation (JFM-96-1504); Stewart Olds, Incorporated, d/b/a Stewart Honda, a California Corporation (JFM-96-1504); Goodwin Motors, Incorporated, d/b/a Goodwin Honda, a California Corporation (JFM-96-1504); Garsten Motors, Incorporated, d/b/a Garsten Honda, a New York Corporation (JFM-96-1507); June Jensen, (JFM-96-1505); Byrnes-Mccarthy, Incorporated, a New Hampshire Corporation (JFM-96-1724); Paradise Pontiac, Incorporated, an Ohio Corporation (JFM-96-1702); Nault Enterprises, Incorporated, d/b/a Nault's Honda, a New Hampshire Corporation (JFM-96-1774); James McKoane Enterprises, Incorporated, a California Corporation (JFM-96-1915); Hardin Oldsmobile, d/b/a Hardin Honda, a California Corporation (JFM-96-1838); Rule, Incorporated, d/b/a Rule Honda, a Virginia Corporation (JFM-96-2757); Coastal Imports, Incorporated, d/b/a Vista Honda 126 East, a California Corporation (JFM-96-2758); International Automobiles, Incorporated, a New Jersey Corporation (JFM-96-2778); Philip Winter, an Oregon Resident (JFM-96-2716); Frederick H. Powell, (JFM-96-1489); Powell's Auto Center, Incorporated, (JFM-96-1489); G. Marshall Butler, (JFM-96-3447); M. Butler, Incorporated, (JFM-96-3447); PHC Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); First International Motors Incorporated and successor in interest to D'Imports, Incorporated, d/b/a D'Honda, a California Corporation (JFM-96-3743); Porter Chevrolet, Incorporated, (JFM-96-3893); Clarence B.

Small, an individual (JFM-96-3932); James A. Small, an individual (JFM-96-3932); Bud and Jim Small, Incorporated, a Pennsylvania Corporation (JFM-96-3932); Johnson Motor Company, Incorporated, d/b/a Johnson Honda-Nissan, an Ohio Corporation (JFM-96-726); D & C Chevrolet Company, d/b/a D & C Honda, a New Jersey Corporation in case (JFM-96-3858); Bill Rule, Incorporated, d/b/a Honda Nissan of Covington, a Virginia Corporation (JFM-96-4026); Woodson Pontiac, Incorporated, d/b/a Richard Woodson Honda, a Virginia Corporation (JFM-97-186); Alvin's Enterprises, Incorporated, d/b/a Alvin's Honda Sales, a Pennsylvania Corporation (JFM-97-201); Colonial Limited, Incorporated, d/b/a Colonial Honda; S & R Auto Sales, Incorporated, d/b/a Roger Miller Honda of Huntington Beach, a California Corporation; Roger Miller Imports, Incorporated, d/b/a Roger Miller Acura of Beverly Hills, a California Corporation; Beverly Hills R & R, Incorporated, d/b/a Roger Miller Honda of Beverly Hills; C.H. Jorgensen, d/b/a Jorgensen's Honda, a Corporation (JFM-97-1624); Yonkers Motors Corporation, d/b/a Yonkers Motors, a New York Corporation (JFM-95-3271); Joy Libert Gelb, (JFM-95-3271) Yonkers Motors Corporation; Bill Edwards Oldsmobile, Incorporated, a Virginia Corporation (JFM-97-2945); William Edwards, Sr., (JFM-97-2945); William Edwards, Jr., (JFM-97-2945); Klein Foreman Motors, Incorporated, d/b/a Foreman Honda, a California Corporation (JFM-97-852); Frahm Honda, a California Corporation (JFM-97-3006); Gene Gabbard, Incorporated, d/b/a Gene Gabbard Lincoln Mercury, d/b/a Gene Gabbard's Stockton Lincoln Mercury Honda, a California Corporation (JFM-97-3224); Gene Gabbard, (JFM-97-3224); James Gabbard, (Jfm-97-3224); Gary Gabbard, (JFM-97-3224); Harvey & Madding, Incorporated, d/b/a Dublin Honda, a California Corporation (JFM-97-3212); Harvey & Sons, Incorporated, d/b/a

Hayward Acura, a California Corporation (JFM-97-3212); Ken Harvey, (JFM-97-3212); Harry Cramer Honda; Stanford A. Cramer, individually in JFM-97-1330; WPS, Incorporated, d/b/a Honda Cars of Columbia, JFM-97-1288; Dorothy Van Dalsem, as Executrix of the Estate of William M. Van Dalsem (JFM-95-2716); Colonial Limited, Incorporated, d/b/a Colonial Honda, a California Corporation (JFM-97-1136); Balise Motor Sales Company, d/b/a Balise Honda, a Massachusetts Corporation (JFM-98-1286); Barr Motors, Incorporated, d/b/a Barr Honda, a Pennsylvania Corporation (JFM-98-1299); Steve Hopkins, Incorporated, a California Corporation (JFM-98-1497); Larry Hopkins, Incorporated, a California Corporation (JFM-98-1497); Steve Hopkins, a California Resident (JFM-98-1497); Menard & Holmberg, Incorporated, d/b/a Menard & Holmberg Honda/Isuzu, a Massachusetts Corporation (JFM-98-933); Pioneer Edsel Sales, Incorporated, d/b/a Pioneer Honda, Honda, a California Corporation (JFM-98-828); South City, Incorporated, d/b/a South City Honda, a California Corporation (JFM-98-1023); Ed Wittmeier Ford, Incorporated, d/b/a Wittmeier Honda, a California Corporation (JFM-98-1025); Sherwood Imports, Incorporated, d/b/a Sherwood Honda, (JFM-98-1755); Tamaroff Buick, Incorporated, d/b/a Tamaroff Honda, (JFM-98-1756); Leslie Segel, an Oregon Resident (JFM-98-2315); Segel Enterprises, Incorporated, d/b/a Town & Country Cadillac Oldsmobile Honda, a California Corporation (JFM-98-2315); Frank Mitchell, JFM-98-2438; Jay Mitchell, a California Resident (JFM-98-2438); B-J Marchese Motor Company, a Pennsylvania Corporation (JFM-98-2812); B.J. Marchese Honda, (JFM-98-2812); B.J. Marchese, (JFM-98-2812); Marshall Chevrolet, Volvo, Honda, Incorporated, a Pennsylvania Corporation (JFM-98-3821); Henry C. Marshall, individually (JFM-98-3821); Globe Auto Imports, d/b/a Globe Honda, a Florida Corporation (JFM-98-4064); James

Mcfrederick, a Florida Resident (JFM-98-4064); Cale Yarborough Motors of South Carolina, Incorporated, d/b/a Cale Yarborough Honda-Mazda, (JFM-98-1828); Cale Yarborough Motors of GA, Incorporated, d/b/a Cale Yarborough Honda, JFM-98-1827; Goodwin Volkswagen, Incorporated, d/b/a Goodwin Honda; Alan L. Strouse; Clovis Honda,

Plaintiffs,

v.

Richard H. Brooks; Stanley James Cardiges; Hugh P Cooper; Dennis R. Josleyn; Robert N. Rivers; Robert A. Mazatelli; Edward A. Temple; Blakely Consultants & Development, Incorporated; Honda Motor Company, Ltd.; Raymond W. Hovsepian; Commonwealth Insurance Company; John W. Billmyer; Roger Novelly; Richard Ditaranto; Does 1-50; Koichi Amemiya; Yoshide Munekuni; Mark L. Benson; Damien C. Budnick; David L. Pedersen; Thomas A. Caulfield, a California Resident; John J. Conway, a New Jersey Resident; Lyon & Lyon, a California Partnership; Roland N. Smoot, a California Resident; Frederick W. Meis, Jr., a Texas Resident; Frank Pisano, a Colorado Resident; Beatrice Sikora; Larry C. Finley; Peter Epsteen; Joseph R. Hendrick, III, a North Carolina Resident; Angelo Falconi, a Pennsylvania Resident; Cliff Peck; John Rosatti; William Schuiling; Joseph Pope, a California Resident; Shau Wai Lam, a New Jersey Resident; Henry Khachaturian, d/b/a Hank Torian, a California Resident; Mid Peninsula Motors, Incorporated, a California Corporation; Auto Car, Incorporated, a California Corporation; Edgren Motors, Incorporated, a California Corporation; Martin Lustgarten; Does 1-100, Inclusive; John L. Hendrick, a North Carolina Resident; Hendrick Automotive Group, a North Carolina Corporation; Dah Chong Hong, Ltd., a California Corporation; Dah Chong Hong Trading Corporation, a/k/a DCH, a New York Corporation; Honda North America, Incorporated;

Hendrick Management Corporation; L.L.L. Sales Company, Incorporated; DCH (Oxnard) Incorporated; David Mcdavid; Vincent Piazza; Santo George Poling; J.R.H., Incorporated; William O. Musgrave; Charles V. Ricks; Wesh, Incorporated; Canyon Honda, a California Corporation; Canyon Acura, a California Corporation; Rick Hines, an Individual; Corona Honda, a California Corporation; David Conant; Virginia's First Family Of Fine Cars Incorporated, d/b/a Brown Oldsmobile Honda Saab, a Virginia Corporation; Al Sheng, an Individual; Earl Pilcher, (JFM-96-3447); B.D.A. Enterprises Corporation, formerly known as Town & Country Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); Barry Alexander, (JFM-96-3448); Rick Hendrick, a New Jersey Resident (JFM-96-3858); Lyon & Lyon, a California Partnership; Roland N. Smoot, a California Resident; NFI Incorporated, a Corporation (JFM-96-4026); Bird, Bethea, Jordan & Griffin, P.A.; Irving H. Laserow, JFM-95-2492 Metro Auto, Incorporated; I.H. Laserow and Company, P.C., JFM-95-2493 Metro Auto, Incorporated; Edwin R. Taylor; Does 8-50; Tasha, Incorporated; Rick Hendrick Honda Cars Company, JFM-97-1288; Tower H. Ltd.; DCH Investments, Incorporated, (California); Civic Center Motors, Ltd., d/b/a White Plains Honda, a New York Corporation; 31-37 North Moore Street Corporation; Rick Heinz, Hardin Oldsmobile JFM-96-1838; Paul T. Bohlander; Sunshine Honda; Richard H. Brooks; Clarence Fincher; Tetsuo Chino, Former California resident and now residing in the Nation of Japan; Hendrick Management Company Limited Partnership; Hendrick Corporation; Hendrick Automotive Group; Hendrick Management Corporation; Thomas Del Franco; William Kutchera; James A. Thompson, a Florida Resident; Linda Lustgarten, a Pennsylvania Resident; Scott Lustgarten, a Pennsylvania Resident; Classic Auto Group, Incorporated, a New Jersey Corporation; Scott Imports, Incorporated, d/b/a Main Line

Honda, a Pennsylvania Corporation; Martin Newark Dealerships, Incorporated, d/b/a Martin Honda, a Delaware Corporation; The Ted Stevens Car Company, Incorporated, a California Corporation; Theodore J. Stevens, a California Resident; White Plains Honda, a New York Sole Proprietorship; Paul Singer; John D'Elia,

Defendants,

American Honda Motor Company, Incorporated,
Defendant & Third Party Plaintiff,

v.

Lawrence Silver; Silver & Field,
Movants-Appellees,

and

Middletown Motors, Incorporated; Richard Catena; Imports of Freehold, Incorporated; Grand Motor Car Company, Incorporated; R.C. Caldwell Imports, Incorporated; David Trainer; Hollywood Imports Limited; Plaza Motors of Brooklyn, Incorporated; Hempstead Motors, Limited; North Palm Imports, Limited; Crystal Bay Imports, Limited; Paramus World Motors, Incorporated; Daron Motors, Incorporated; DCH Motors, Incorporated; DCH Manhattan; Stephen S. Bird; Bethea, Jordan & Griffin, P.A.; John W. Billmyer; S. James Cardiges; Robert A. Mazzitelli; Roger Novelly; Damien C. Budnick; David L. Pedersen; Mark L. Benson; John J. Conway; Clarence Fincher; Johnny R. Fincher; William Vince; Wayne Vince; W. Rodman Ryan; WilliamLia, Jr.; Don Lia; Dennis R. Josleyn; Hugh P Cooper; Robert N. Rivers; Frederick W. Meis, Jr.; Beatrice Sikora; William Schuiling; David Trainor; Santo George Poling; Vincent Radley; Karen Radley; Frank Pisano; Larry C. Finley; Thomas A. Caulfield; Peter Epsteen; Hendrick Corporation; Angelo Falconi; Mid-Peninsula Motors, Incorporated; Auto Car,

Incorporated; Edgren Motor Company; Don Carlton; Richard Catena; John Rosatti; Dah Chong Hong, Ltd.; L.L.L. Sales Company, Incorporated; DCH (Oxnard) Incorporated; Raymond Hovsepian; Irving H. Laserow; I.H. Laserow and Company, P.C.,

Third Party Defendants.

Argued Sept. 25, 2002.
Decided Jan. 17, 2003.

Before TRAXLER, *Circuit Judge*, HAMILTON, *Senior Circuit Judge*, and CLAUDE M. HILTON, *Chief United States District Judge* for the Eastern District of Virginia, sitting by designation.

HAMILTON, *Senior Circuit Judge*.

The United States District Court for the District of Maryland enjoined a husband and wife, both citizens of California, from seeking enforcement of a multi-million dollar arbitration award for legal malpractice that the couple had obtained in California against their former attorney, who was also a citizen of California. In entering its injunction (the Injunction), the district court relied upon the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* The district court believed the Injunction was necessary "to protect the integrity of [its] processes and prevent the Honda [multi-district litigation] proceedings [that had been before it] from being used for an improper purpose . . . ." *In re: American Honda Motor Co., Inc. Dealerships Relations Litig.*, 162 F.Supp.2d 387, 396 (D.Md.2001).

The couple are parties to a multi-district litigation (MDL) settlement agreement that was formally approved by the district court and over which the district court expressly retained exclusive jurisdiction to rule upon interpretive questions. The district court found the couple had intentionally misled the California arbitrator about the actual nature of the MDL proceedings, and that the couple had knowingly and intentionally pressed an argument before the arbitrator that necessarily required the arbitrator to resolve a significant interpretive question involving substantive provisions of the MDL settlement agreement.

For reasons that follow, we affirm the district court's order entering the Injunction.

I.

The couple to which we have just referred are Ruth and Roger Miller (the Millers).[1] At the end of 1986, the Millers purchased Huntington Beach Honda Automobile Dealership, partly through owner financing. The Millers later defaulted on their financing obligations under the purchase deal, and as a result, the widow of one of the two former owners of the dealership filed a civil action against the Millers in California state court in March 1994 (the 1994 State Court Action). The Millers, who were not then represented by legal counsel, filed a cross-complaint, and joined the widow of the other former owner as a defendant on the cross-complaint.

In July 1994, California attorney Lawrence Silver (Silver) undertook legal representation of the Millers in the 1994 State Court Action. In this regard, Silver and the Millers entered

[1] Many of the facts set forth in this opinion are taken directly from the district court's memorandum opinion of August 24, 2000. *In re: American Honda*, 162 F.Supp.2d at 388-90. Where facts are disputed, we will so state.

into a retainer/fee agreement for legal services, under which Silver and the Millers agreed that any disputes between them "shall be subject to mandatory arbitration." (J.A. 587).

In April 1995, Silver filed an amended cross-complaint on behalf of the Millers naming American Honda Motor Company, Incorporated (American Honda) as a defendant, asserting claims against the company under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and under California common law. All such claims arose from the Honda bribery scandal that eventually became the subject of the MDL proceedings before the district court in Maryland (the Honda MDL Proceedings).[2] The crux of the bribery scandal was that Honda received kickbacks and bribes from certain Honda dealerships throughout the United States in return for increased allocations of selective new cars.

American Honda filed a demurrer to the RICO claim in the Millers' amended cross-complaint, in the 1994 State Court Action, on the ground that the Millers had failed to plead legally sufficient damages under RICO. The demurrer was sustained without leave to amend, but without prejudice to the Millers' ability to file a motion to reconsider the court's decision denying leave to amend. In accordance with this order, Silver, on behalf of the Millers, filed a motion for reconsideration, which was denied.

The relationship between the Millers and Silver subsequently deteriorated, and after the Millers threatened to assert claims for legal malpractice against Silver, Silver withdrew his appearance as counsel for the couple in the 1994 State Court Action. Thereafter, against Silver's advice, the Millers voluntarily dismissed their remaining claims in the 1994 State Court Action and refiled them in the United States District

---

[2] We refer to American Honda Motor Company, Incorporated and its affiliates collectively as "Honda" throughout this opinion.

Court for the Central District of California. The Millers' claims were then transferred to the district court (for the District of Maryland) as part of the Honda MDL Proceedings. Once the Millers' claims became part of the Honda MDL Proceedings, Honda moved to dismiss them on the basis that the Millers' voluntary dismissal of those same claims in the 1994 State Court Action constituted dismissal with prejudice.

The law firm of Duane, Morris & Heckscher (Duane/Morris) represented the Millers as well as several other plaintiffs in the Honda MDL Proceedings. Members of Duane/Morris served on the plaintiffs' executive committee, and the Millers personally participated in the settlement approval process. Ultimately, the Millers opted to accept the settlement agreement which concluded the Honda MDL Proceedings. Hereafter, we will refer to this settlement agreement as "the MDL Settlement Agreement." Under the MDL Settlement Agreement, the Millers received the largest amount of damages of any dealership—$6.32 million. But according to the district court's memorandum opinion that accompanied its injunction order presently under review, $6.32 million "was $1 million too high under the allocation formula that was used in determining the amounts to be paid to settling class members." *In re: American Honda*, 162 F.Supp.2d at 389. In this regard, the district court explained as follows:

> The formula contemplated that each dealer would be paid $4,000 for each car which, as determined by a regression analysis, the dealer had not received because of the bribery scheme. Some dealers, like the Millers, purchased their dealership during the class period, and were entitled to compensation only for those cars that were apportioned under the settlement formula to the dealership after the date of their purchase. This apportionment ordinarily was easy to accomplish because—apparently in all cases other than the Millers—Honda

> assigned a new dealer number when the dealership changed hands. The Millers, however, were given the same dealer number as their predecessors and therefore received an apportionment of all of the cars to which their dealership was entitled in 1986 despite the fact that they did not purchase the dealership until mid-December of that year. This resulted in a misapportionment to them of 250 cars, which in turn resulted in an excess recovery of $1 million. *The error apparently was known both to the Millers and Duane/Morris when the Millers decided to accept the MDL settlement.*

Id. at 389-390 (emphasis added).

In March 1997, the Millers sued Silver for legal malpractice in California state court. The Millers alleged that Silver had acted negligently in the 1994 State Court Action. The parties subsequently agreed that the malpractice action would be dismissed without prejudice and that the statute of limitations would be tolled until April 1999.

On October 9, 1998, the district court entered its "Order of Final Settlement Approval and Judgment of Dismissal of Settled Claims" in connection with the MDL Proceedings.[3] In this order, the district court formally approved the MDL Settlement Agreement. In so approving, the district court expressly found that the total amount of settlement to be paid the plaintiffs' class under the MDL Settlement Agreement was "fair, reasonable, and adequate, and in the best interests of [the] Plaintiff[s'] Class as a whole." (J.A. 548). Likewise, the district court found that the plan of distribution to individual class members under the MDL Settlement Agreement was "fair and reasonable, [and] is in the best interest of the Plaintiff[s'] settlement class . . . ." (J.A. 550).

---

[3] Hereafter, we will refer to the district court's "Final Order of Settlement Approval and Final Judgment of Dismissal of Settled Claims" as "the district court's Settlement Approval Order."

Of significant relevance in the present appeal, the district court's Settlement Approval Order states that the district court "shall have and retain exclusive jurisdiction with respect to (i) implementation, interpretation and enforcement of the Settlement Agreement; (ii) supervision, allocation and distribution of the settlement fund; and (iii) any applications or disputes concerning attorneys' fees, costs, and expenses which may arise." (J.A. 551).

After the district court entered its Settlement Approval Order, Silver filed a notice of lien in the district court against the Millers' share of the settlement proceeds. Silver based his lien upon his claim that he deserved compensation for the work that he had performed for the Millers in the 1994 State Court Action.

On the eve of expiration of the tolling agreement between the Millers and Silver, the Millers filed a malpractice action against Silver in California state court (the 1999 State Court Action). In their complaint, the Millers acknowledged that they had partially mitigated their damages through the MDL Settlement Agreement. Nevertheless, the Millers alleged that but for Silver's negligence, they would have recovered an additional $7 million in connection with the Honda bribery scheme. Silver filed a counterclaim for approximately $1.8 million in attorney's fees.

Silver next made a motion before the district court requesting that the district court adjudicate the merits of his lien against the Millers' share of the proceeds under the MDL Settlement Agreement. He concomitantly requested that the district court adjudicate the merits of the Millers' malpractice claim against him pending in the 1999 State Court Action and his counterclaim for attorney's fees in the same action.

The Millers vehemently opposed the motion on the ground that California state law issues would predominate in their dispute with Silver. Notably, as found by the district court,

the Millers did not disclose before the district court that they intended to assert a legal malpractice theory in the 1999 State Court Action that would require an intimate knowledge of the legal issues involved in the Honda MDL Proceedings and the MDL Settlement Agreement. They also did not disclose before the district court that they intended to argue in such action that the damages they were seeking from Silver were distinct from the damages due them under the MDL Settlement Agreement.

Based upon the Millers' representation that issues of California state law would predominate in all of the disputes between themselves and Silver, the district court initially declined to exercise jurisdiction to adjudicate the merits of Silver's lien against the settlement proceeds due the Millers under the MDL Settlement Agreement, as well as the merits of the Millers' malpractice claim against Silver in the 1999 State Court Action and his counterclaim for attorney's fees.

Having lost his motion to have the district court adjudicate the merits of his malpractice/fee dispute with the Millers, Silver relied upon the mandatory arbitration provision in the retainer/fee agreement between himself and the Millers to move in the 1999 State Court Action for mandatory arbitration. The California state court granted the motion.

The arbitration, which lasted a total of fifteen days, took place in California before a retired California state court judge. A key issue in the arbitration was whether, but for Silver's alleged negligence, the Millers would have obtained a greater recovery from American Honda in the 1994 State Court Action than they did under the MDL Settlement Agreement. Of relevance on appeal, the Millers contended that, if their case had been handled properly, they would have recovered $7,475,000 in so-called "blue sky damages" from American Honda for having greatly overpaid for goodwill at the time they purchased their dealership. The Millers denied before the arbitrator that the MDL Settlement Agreement

compensated them for such "blue sky damages." The Millers referred to the damages due them under the MDL Settlement Agreement as "allocation damages." According to the Millers, these damages only compensated them for their lost profits as a result of not receiving their fair allocation of automobiles from Honda.

On January 10, 2001, the arbitrator issued an award heavily in favor of the Millers. Finding that the MDL Settlement Agreement did not compensate the Millers at all for the amount they had overpaid in goodwill when they purchased their dealership, the arbitrator awarded the Millers $7,475,000 as damages for such overpayment.[4] The arbitrator declined to award the Millers any amount of "allocation damages" on the basis that the Millers were awarded an adequate amount of "allocation damages" under the MDL Settlement Agreement. The arbitrator ruled against Silver on his counterclaim for attorney's fees. In a supplemental award issued at a later date, the arbitrator awarded the Millers $871,474.96 in attorney's fees in connection with their prosecution of their malpractice claim.

After issuance of the arbitration award, Silver filed a motion in the Maryland district court for reconsideration of the district court's decision not to adjudicate the merits of his malpractice/fee dispute with the Millers. Silver also sought a permanent injunction to enjoin the Millers from enforcing their arbitration award in California state court. The parties fully briefed and argued the motion before the district court, and the Millers agreed not to seek judicial enforcement of their arbitration award pending a decision by the district court.

---

[4] The arbitrator also awarded the Millers $475,567.51 in damages for malpractice on the part of Silver that was not directly related to Silver's representation of the Millers with respect to their claims arising from the Honda bribery scheme.

On August 24, 2001, the district court issued an order and memorandum opinion granting Silver's motion and permanently enjoining the Millers from enforcing their arbitration award to the extent that it awarded them $7,475,000 for so-called "blue sky damages." *In re: American Honda*, 162 F.Supp.2d at 387-396. The district court also enjoined the Millers from enforcing the supplemental award of attorney's fees with the proviso that the Millers had the opportunity to file a motion with the district court for a determination regarding the amount of attorney's fees and costs that they had incurred in the arbitration proceedings in connection with their "blue sky damages" claim. *Id.* at 396. The district court ruled that after determining such amount, it would modify the Injunction to permit the Millers to enforce the remaining portion of the supplemental award. *Id.*

Because we review on appeal the district court's entry of the Injunction for abuse of discretion, *In re March*, 988 F.2d 498, 500 (4th Cir.1993), we will next set forth the district court's expressed reasons for entering the Injunction. The district court began the analysis portion of its August 24, 2001 memorandum opinion by setting forth the Millers' first theory as to why the district court should not enter the Injunction. In this regard, the district court stated as follows:

> The theory espoused by the Millers during the arbitration proceedings in support of their claim for blue sky damages was relatively straightforward. According to the Millers, [the judge in the 1994 State Court Action] had sustained Honda's demurrer in the litigation . . . because Silver had misplead RICO damages by not claiming "concrete financial loss" as required by the decision in *Sheperd v. American Honda Motor Co.*, 822 F.Supp. 625 (N.D.Cal.1993). Further, according to the Millers, Silver knew how to plead damages properly because in the case of *Austin Motors v. American Honda*, which he filed on behalf of other clients in the

> Central District of California and which was transferred here as a part of the MDL proceedings, I overruled a motion to dismiss filed by the Honda defendants on *Sheperd* grounds. The sustaining of the demurrer in the California case led to the Millers' decision to dismiss that action. That dismissal, in turn, led to the motion to dismiss the Millers' claims filed by Honda in this court. Honda's motion was still pending before me when the MDL settlement was reached, and the Millers assert that their fear that I would grant the motion lead them to accept the settlement instead of opting out. Finally, they contend, that if they had opted out, they would have pursued their case against Honda and received both the allocation damages they received as part of the MDL settlement and the blue sky damages they allegedly suffered as a result of having overpaid for their dealership.

In re: American Honda, 162 F.Supp.2d at 390-91 (footnote omitted).

The district court identified what it believed to be five flaws in the Millers' causation theory. The first flaw the district court identified was that no one familiar with the Honda bribery scheme litigation could reasonably conclude that Silver's alleged malpractice in not pleading RICO damages properly in the 1994 State Court Action is what caused the state court judge to sustain Honda's demurrer. The second flaw the district court identified was that even assuming that Silver misplead the RICO damages in the 1994 State Court Action, that misfeasance was not the precipitating event which allegedly placed the Millers on the horns of a dilemma in deciding whether to accept the MDL Settlement Agreement. Rather, the district court reasoned, "their predicament was caused by their voluntary dismissal of the California action after Silver no longer represented them and against his advice." *Id.* at 392.

The third flaw the district court identified in the Millers' causation theory was that, to the extent the Millers prompted the arbitrator to award them so-called "blue sky damages" by arguing that such damages were something different than "allocation damages," the Millers caused the arbitrator to usurp the district court's exclusive jurisdiction to interpret the MDL Settlement Agreement. With regard to the merits of the interpretive issue itself, the district court held that the Millers' argument was off the mark, reasoning as follows:

> As I have earlier indicated, the blue sky damages award was intended to compensate the Millers for overpaying . . . for the goodwill of their dealership. Goodwill had been calculated for purposes of the purchase agreement as a multiple of the dealership's prior earnings. Its value was found by the arbitrator to have been inflated because the earnings on which it was based were themselves inflated by the sale of cars that had been allocated to the dealership by corrupt Honda executives in return for bribes that [the previous owners] had paid. Although the damage for overpayment of goodwill is somewhat conceptually different from damages that the Millers suffered by misallocation of automobiles to them after they had purchased the dealership, the two types of damage are economically interrelated. From one perspective, the recovery the Millers received through the MDL settlement for automobiles they should have received but for the bribery scheme substantially compensated them for the full revenue stream for which they had paid when they purchased the dealership. In any event, economics aside, the settlement agreement in the MDL settlement defined "allocation claims" to encompass "any claim, allegation or assertion arising in any way from the allocation or distribution of Honda automobiles. . . ." Under this definition the blue sky

> damages the Millers received in the arbitration proceeding clearly were not distinct from, but one of the aspects of, allocation damages.

Id. at 393 (second ellipses in original).

The fourth flaw the district court identified in the Millers' causation theory was that the Millers received $1 million more under the MDL Settlement Agreement than they were actually entitled to for allocation damages as the Millers restrictively define it, yet the Millers failed to disclose such overpayment to the arbitrator. The fifth and final flaw in the Millers' causation theory identified by the district court was that in awarding the Millers so-called "blue sky damages," the arbitrator made a speculative assumption that the Millers would have recovered "blue sky damages" in state court if they had not accepted the MDL Settlement Agreement.

The district court next addressed the Millers' argument that however great the injustice their fallacious arguments in the arbitration proceeding may have created, the district court was powerless to remedy it because of the strong federal policy in favor of arbitration, and because the district court lacked jurisdiction to review an arbitration award entered in a California state proceeding. In response, the district court acknowledged that the general propositions of law upon which the Millers relied were sound, but stressed that this case "turns not upon general principles but on its particulars." *Id.* at 395. The district court then went on to state:

> Were I not to grant relief to Silver, I would be permitting the MDL proceedings over which I presided to become a vehicle for the commission of a substantial injustice. The Millers actively participated, both through their counsel and in a *pro se* capacity, in the MDL proceedings. They received a substantial settlement from it, including $1 million more than they were entitled to

under the allocation formula. They knew that in order to approve the settlement, I would have to find that it was "fair, adequate and reasonable" for all members of the class, including persons, such as themselves, who had allegedly overpaid for their dealerships because of the bribes paid by their predecessors. They never disclosed at the time they accepted the settlement their own view that the settlement was, in fact, unfair, inadequate, and unreasonable because it did not compensate them and similarly situated class members for their blue sky damages. Nor did they reveal that they were reserving their right to pursue such a claim against their former attorney.

Moreover, when opposing Silver's original motion requesting that I exercise jurisdiction over this dispute, the Millers misrepresented that issues of state law would predominate in resolution of the dispute. They did not disclose that they would be asserting in the arbitration proceeding a legal malpractice theory that would require an intimate knowledge of the legal issues involved in the Honda MDL proceedings. They also did not reveal that one of the contentions they intended to make in the arbitration proceeding was that the blue sky damages they were seeking were distinct from the allocation damages they had recovered in the MDL settlement. Resolution of that issue involved interpretation of the MDL settlement agreement and, as the Millers knew, the settlement agreement conferred exclusive jurisdiction upon this court to interpret its terms.

Most importantly, for the reasons I have previously stated, the Millers made arguments before the arbitrator about the Honda-related litigation that were so totally without merit that they can only be characterized as

> untrue. They also withheld from the arbitrator that they received $1 million for 250 cars apportioned to them before they purchased their dealership.

Id. at 395-96. In a footnote, the district court added that it was enjoining the arbitration award "not because of any mistake [the arbitrator] made but because the Millers had no right to make before him the deceptive arguments they did, misrepresenting what had occurred during the Honda bribery litigation." *Id.* at 395 n. 7.

To summarize, the district court viewed "the global settlement of the claims arising from the Honda bribery scheme []as an asset, both financial and judicial in nature, created under the auspices of the MDL proceedings." *Id.* at 396. The district court believed that "[t]hose who accepted its benefits have no right to obtain further recovery (either from Honda or any third parties) by misrepresenting to another tribunal that which led to its accomplishment." *Id.* at 396. The district court found that "[t]his is what the Millers have done." *Id.*

Based upon its findings of misconduct by the Millers and the usurpation of its exclusive jurisdiction to resolve interpretative questions under the MDL Settlement Agreement, the district court expressly invoked the All Writs Act, 28 U.S.C. § 1651(a), to enter the Injunction. According to the district court, such invocation was necessary "to protect the integrity of [its] processes and prevent the Honda MDL proceedings from being used for an improper purpose . . . ." *Id.* at 396.

This timely appeal by the Millers followed in which the Millers challenge the Injunction on the ground that the district court lacked the authority to enter it. Also, Silver has filed a cross-appeal on the ground that the district court erred by declining to adjudicate the merits of his lien on the Millers' portion of the settlement funds.

II.

The overarching question presented in this appeal is whether the All Writs Act, 28 U.S.C. § 1651(a), gives a federal district court authority to enjoin judicial enforcement of an arbitration award, issued pursuant to state arbitration procedures, when: (1) the underlying arbitration resolved an issue over which the district court retained exclusive jurisdiction to resolve pursuant to an order by that district court approving a settlement agreement in MDL proceedings over which the district court possessed subject matter jurisdiction; and (2) the parties enjoined engaged in misconduct before the district court and the arbitrator in connection with the subject of the injunction.[5] We begin our resolution of this question by setting forth the actual language of the All Writs Act and the established jurisprudence surrounding it.

The All Writs Act, 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* Although the All Writs Act does not independently confer subject-matter jurisdiction on federal courts, *Syngenta Crop Protection, Inc. v. Henson*, 123 S.Ct. 366, 370, 154 L.Ed.2d 368 (2002), it does "authorize a federal court 'to issue such commands . . . as may be

---

[5] We note that the district court's August 24, 2001 memorandum opinion identifies several issues regarding the merits of the Millers' malpractice claim about which the district court disagreed with the arbitrator's resolution. However, with one exception, we *do not* read such memorandum opinion to establish that the district court entered the Injunction because it disagreed with the arbitrator's resolution of the merits of the Millers' malpractice claim. The one exception is the arbitrator's resolution of the interpretive question under the MDL Settlement Agreement pertaining to the nature of the damages covered by that agreement, which interpretive question the district court retained exclusive jurisdiction to resolve pursuant to its Settlement Approval Order.

necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained,' "*Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40, 106 S.Ct. 355, 88 L.Ed.2d 189 (1985) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). Such authorization, however, does not control "[w]here a statute specifically addresses the particular issue at hand...." *Pennsylvania Bureau of Corr.*, 474 U.S. at 43, 106 S.Ct. 355. For example, a party "may not, by resorting to the All Writs Act, avoid complying with the statutory requirements for removal" of a case in state court to federal court. *Syngenta Crop Protection, Inc.*, 123 S.Ct. at 370.

Here, the district court enjoined the Millers from enforcing that portion of the arbitration award relating to their so-called "blue sky damages" in large measure to protect its exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement. The district court was also moved to action by its desire to rectify the injustice the district court found the Millers had perpetrated by engaging in misconduct in order to defeat such jurisdiction. We find no abuse of discretion in this regard.[6]

The district court's possession of subject matter jurisdiction over the claims of the Plaintiffs' Class in the MDL Proceedings is not in dispute.[7] Neither is it disputed that, pursuant to the district court's Settlement Approval Order, the district court retained exclusive jurisdiction to interpret the

---

[6] As previously stated, we review the district court's entry of the Injunction for abuse of discretion. *In re: March*, 988 F.2d at 500.

[7] The class action complaint in the MDL Proceedings raised claims under several federal statutory sections and state law. Thus, the district court possessed subject matter jurisdiction over the MDL Proceedings under the federal question statute and the supplemental jurisdiction statute. 28 U.S.C. § § 1331, 1367(a).

terms of the MDL Settlement Agreement should any dispute over its meaning arise. The record in this case leaves no doubt that one of the key issues before the arbitrator was whether the MDL Settlement Agreement compensated the Millers for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership. Indeed, in order to establish the damages element of their legal malpractice claim against Silver, the Millers had to prove that but for Silver's malpractice, they would have recovered the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership. *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194, 108 Cal.Rptr.2d 471, 25 P.3d 670, 672 (Ca.2001) ("In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.").

Whether the Millers had already received full or partial compensation for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership undeniably raised an interpretive question under the MDL Settlement Agreement. Specifically, the Millers' argument regarding "blue sky damages" versus "allocation damages" raised an interpretive question regarding what damages the Millers received for their "allocation claims" under the MDL Settlement Agreement. However, in flagrant disregard of the district court's exclusive jurisdiction to resolve such interpretative question, the Millers argued before the arbitrator that they were not compensated under the MDL Settlement Agreement for what they termed "blue sky damages."

Accordingly, under all of the facts and circumstances that we have just outlined, we have no hesitancy in concluding that the Injunction was necessary to prevent direct frustration of the district court's Settlement Approval Order, for which the district court undeniably possessed subject matter jurisdiction to issue.[8] We also have no trouble in concluding that the Injunction was necessary to cure the injustices created by the Millers through their abuse of the MDL process.

The Millers argue that, assuming *arguendo* the validity of these conclusions, the district court still abused its discretion in entering the Injunction because the Injunction did not meet any of the statutory requirements of the Anti-Injunction Act, 28 U.S.C. § 2283. *Syngenta Crop Protection, Inc.*, 123 S.Ct. at 370 (a party may not, by resorting to the All Writs Act, avoid compliance with the requirements of a statute that specifically addresses the particular issue at hand).

The Anti-Injunction Act prohibits a federal court from enjoining "proceedings" in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28

---

[8] My dissenting colleague writes that "there is simply no reason to believe the MDL settlement order would be undermined by the enforcement of the arbitration award against Silver." *Post* at 58. Quite to the contrary, enforcement of the arbitration award against Silver would allow the Millers to recover money damages based upon an arbitrator's interpretation of the term "allocation claim" under the MDL Settlement Agreement, the existence of which interpretation is in direct contravention of the exclusive jurisdiction of the district court to resolve interpretive questions under the MDL Settlement Agreement, *as expressly provided in the Settlement Approval Order*. The obvious purpose of the district court retaining exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement is to require, in the interests of fairness and justice, that all parties to the MDL Settlement Agreement be bound by the same interpretation of its terms. Under this circumstance, the undermining of the Settlement Approval Order by enforcement of the arbitration award against Silver is self-evident.

U.S.C. § 2283. This prohibition extends to indirect injunctions against parties. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970) ("It is well settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding."). For purposes of the Anti-Injunction Act, the term "proceedings" includes "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403, 56 S.Ct. 278, 80 L.Ed. 293 (1935).

For over two-hundred years, the Anti-Injunction Act "has helped to define our nation's system of federalism." *Employers Res. Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1130 (4th Cir.1995). The three exceptions to the Anti-Injunction Act's prohibition against enjoining state court proceedings "are construed narrowly, . . . and are not [to] be enlarged by loose statutory construction." *Id.* (internal quotation marks omitted) (alteration in original). The "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act is widely understood to apply most often when a federal court was the first in obtaining jurisdiction over a *res* in an *in rem* action and the same federal court seeks to enjoin suits in state courts involving the same *res*. *In re: Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 365 (3d Cir.2001); 17 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure 2d*, § 4225 (2d ed.1988). However, support for a broader application of the "necessary in aid of its jurisdiction" exception can be found in the Supreme Court's statement that both this exception and the third exception to the Anti-Injunction Act allow federal injunctive relief against state court proceedings where it is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to

decide that case." *Atlantic Coast Line R.R. Co.*, 398 U.S. at 295, 90 S.Ct. 1739. And as some legal scholars have pointed out, "[t]here have been some signs of such flexibility in the recent cases." *Federal Practice and Procedure 2d* § 4225 at 531.

The most prominent area of such flexibility is school desegregation cases. "In the school desegregation area the federal court typically takes a controversy in hand, modifying its orders as need be from time to time, and it has been held that the court can enjoin state proceedings that would interfere with the federal court's continuing jurisdiction." *Id.* Indeed, in a school desegregation case, we have relied upon the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act in upholding an injunction restraining a state court suit: (1) in which the plaintiffs claimed that the school board was discriminating against white children with respect to the statutory standards applicable to exceptionally talented children; and (2) where plaintiffs' claims could not be separated from the order previously entered by the district court. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir.1974). Especially relevant to the appeal before us is the fact that, in the multi-district litigation area, some courts have permitted injunctions against parallel state court proceedings under the "necessary in aid of its jurisdiction" exception where such state court proceedings threatened to frustrate multi-district litigation proceedings and disrupt the orderly resolution of those proceedings. *In re: Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d at 365 (collecting cases); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir.1996) (collecting cases) ("We agree that the necessary in aid of jurisdiction exception [to the Anti-Injunction Act] should be construed to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court's jurisdiction nugatory." (internal quotation marks omitted)).

The "to protect or effectuate its judgments," language of the Anti-Injunction Act has come to be known as "the relitigation exception" to the Anti-Injunction Act. According to the Supreme Court, "[t]he relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). An injunction may issue under the relitigation exception only if the claims or issues subject to the injunction have actually been decided. *Id.* at 148, 108 S.Ct. 1684 (stating that the court must look to what the previous order "actually said" and may not "render a *post hoc judgment* as to what the order was intended to say"); *LCS Servs., Inc. v. Hamrick*, 925 F.2d 745, 749 (4th Cir.1991) ("a complainant seeking to avail himself of the relitigation exception to the [Anti-Injunction] statute must make a strong and unequivocal showing of relitigation of the same issues") (internal quotation marks omitted).

Because the Millers failed to argue below that the Injunction did not fall within one of the express exceptions to the Anti-Injunction Act, we are constrained to review any alleged error on the part of the district court with respect to the Anti-Injunction Act under the plain error standard of review. *In re: Celotex Corp.*, 124 F.3d 619, 630-31 (4th Cir.1997) (adopting plain error standard of review used in criminal cases, as set forth in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), for application in civil cases). Under the plain error standard of review, we may only exercise our discretion to correct a forfeited error, if we: (1) find error; (2) find the error is plain; (3) find the error affects the substantial rights of the party or parties alleging the error; and (4) after examining the particulars of the case, we find the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.* at 630-31.

Our application of the plain error test to the alleged error by the district court reveals that the Millers are not entitled to vacature of the Injunction on the basis of the Anti-Injunction Act. Assuming *arguendo* that the first element of the plain error test is met, *i.e.*, the Injunction violates the Anti-Injunction Act because it enjoins a state court proceeding and each of the Act's three exceptions are inapplicable, the second element of the plain error test is not met, *i.e.*, the error is not plain. For purposes of the plain error test, the term " '[p]lain' is synonymous with 'clear' or, equivalently, 'obvious,' " *Olano* 507 U.S. at 734, 113 S.Ct. 1770, under the law at the time of our appellate consideration, *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). At the present time, the law is not clear or equivalently obvious that the "necessary in aid of jurisdiction" exception to the Anti-Injunction Act's general prohibition against a federal court enjoining a state court proceeding is inapplicable to the Injunction. First, we have already concluded under our discussion of the All Writs Act that the Injunction was necessary to vindicate the district court's exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement. Thus, the plain text of the "necessary in aid of jurisdiction" exception is applicable. Second, as we have already set forth, some federal appellate courts have permitted injunctions under the same exception where a parallel state court action threatens to frustrate federal multi-district litigation proceedings and disrupt the orderly resolution of those proceedings. *E.g.*, *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 202-03 (3d Cir.1993) (holding that it was appropriate as necessary in aid of the district court's jurisdiction in class action asbestos suit to enjoin absent members of plaintiff class from seeking a ruling from state court permitting mass opting out of all plaintiffs in that state, at maturephase of federal settlement proceedings and after years of pretrial negotiation). Here, a strong argument can be made that enforcement of the

arbitration award in favor of the Millers threatens to frustrate the district court's ability to provide a universal interpretation of the term "allocation claim" under the MDL Settlement Agreement, which interpretive question may also arise in the future pursuant to litigation involving other parties to the MDL. In sum, assuming the existence of error, the error is not plain.

Moreover, assuming *arguendo* that the first three elements of the plain error test are satisfied, several factors strongly weigh against our finding that the assumed error seriously affects the fairness, integrity or public reputation of judicial proceedings and will continue to do so unless the assumed error is corrected. First, the Millers do not claim that they in any way lacked the opportunity to raise the Anti-Injunction Act below as a defense to the Injunction. Second, the Millers, as found by the district court and supported by the record on appeal, intentionally mislead the district court at a critical motion stage into believing that they did not intend to make any arguments before the arbitrator that would raise interpretive questions under the MDL Settlement Agreement. Third, despite the Millers' knowledge that the district court retained exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement, the Millers intentionally made arguments before the arbitrator that they knew necessarily raised interpretive questions under the MDL Settlement Agreement. Fourth and finally, as determined by the district court, the Millers were already compensated, under the MDL Settlement Agreement, for their so-called "blue sky damages." In sum, we cannot conclude that the facts here call for us to exercise our discretion to correct an assumed error not raised below.[9]

---

[9] We have also reviewed the Millers' remaining arguments in challenge to the Injunction, and conclude that none warrant vacature of the Injunction.

III.

As we previously stated, under all of the facts and circumstances of this case, we have no difficulty in concluding that the Injunction was necessary to prevent direct frustration of the district court's Settlement Approval Order and to cure injustice created by the Millers through their abuse of the MDL process. Accordingly, we find no abuse of discretion with respect to the district court's invocation of the All Writs Act to enjoin the Millers from enforcing the "blue sky damages" portion (including related attorneys' fees) of their multi-million dollar arbitration award. Therefore, we affirm the district court's order entering the Injunction.[10]

AFFIRMED

---

[10] With respect to Silver's cross-appeal, we also affirm, as not an abuse of discretion, the district court's denial of that portion of Silver's motion requesting the district court to adjudicate the merits of his attorneys' fees claim. We find Silver's arguments in support of his cross-appeal without merit.

TRAXLER, *Circuit Judge*, dissenting:

My colleague Judge Hamilton has done an admirably thorough job of distilling and setting forth the applicable legal principles from decisions interpreting the All Writs Act. *See* 28 U.S.C.A. § 1651(a) (West 1994). I differ only in the conclusion I would reach after applying those principles.

In enjoining the Millers from enforcing their arbitration award through the California court system, the district court exercised jurisdiction pursuant to the All Writs Act.* The All Writs Act grants district courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a). The All Writs Act does not provide an independent source of federal jurisdiction over claims that otherwise would not fall within the jurisdiction of the federal courts, like those filed by the Millers under state law against Silver, a non-diverse defendant. *See Syngenta Crop Protection, Inc. v. Henson*, 123 S.Ct. 366, 370, 154 L.Ed.2d 368 (2002) ("[P]etitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts . . . [T]he All Writs Act does not, by its specific terms, provide federal courts with an independent grant of jurisdiction." (internal quotation marks omitted)); *see also Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir.1997) ("[T]he [All Writs] Act does not allow a court to acquire jurisdiction over an individual or

---

* Although the court also referred to its "inherent jurisdiction to prevent the MDL proceedings from being used to effect the miscarriage of justice," *In re: American Honda Motor Co. Litigation*, 162 F.Supp.2d 387, 395 (D.Md.2001), the order, viewed as a whole, does not purport to rest on its inherent powers as an additional jurisdictional basis. *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir.) (recognizing the inherent authority of a district court to enforce a settlement agreement against the parties where the terms of the agreement have been incorporated into a court order), *cert. denied*, 531 U.S. 918, 121 S.Ct. 277, 148 L.Ed.2d 201 (2000).

property not otherwise subject to its jurisdiction, and does not operate to confer jurisdiction." (internal quotation marks omitted)). Thus, a court may issue a writ or injunction under the All Writs Act only if the court is acting "in aid of" a matter over which it previously obtained jurisdiction.

The grant of power to issue writs "in aid of jurisdiction" under the All Writs Act supplies a district court with the authority to protect the integrity of its orders. *See United States v. New York Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."). Hence, we have recognized that "[t]he All Writs Act empowers a federal court to enjoin parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments." *Farmers Bank v. Kittay (In re March)*, 988 F.2d 498, 500 (4th Cir.1993); *see also Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 (11th Cir.2001) ("[A] district court has the authority . . . to enjoin a party to litigation before it from prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction."), *aff'd sub nom., Syngenta Crop Protection, Inc. v. Henson*, 123 S.Ct. 366, 370, 154 L.Ed.2d 368 (2002); *Texas v. Real Parties in Interest*, 259 F.3d 387, 392 (5th Cir.2001) (recognizing that a number of courts have interpreted the All-Writs Act to "permit a district court to enjoin actions in state court . . . only where necessary to prevent relitigation of an existing federal judgment or otherwise to protect federal court orders."), *cert. denied*, 534 U.S. 1115, 122 S.Ct. 924, 151 L.Ed.2d 887 (2002); *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir.1993) (explaining that the All-Writs Act "empowers federal courts to issue injunctions to protect or effectuate their judgments."); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985

F.2d 1067, 1069 (11th Cir.1993) (per curiam) ("The All Writs Act . . . gives federal courts broad injunctive powers to protect their own judgments . . . This power includes the authority to enjoin arbitration to prevent relitigation.").

Because Silver did not participate in the MDL proceedings as either a litigant or as counsel for the Millers, the dispute between Silver and the Millers is not directly before the district court and does not threaten its settlement order in the same way as would a post-settlement dispute between the Millers and their MDL counsel or the Millers and Honda. *Cf. Thomas v. Powell*, 247 F.3d 260 (D.C.Cir.) (finding that the Anti-Injunction Act did not preclude the district court from enjoining state action between class counsel and his client), *cert. denied*, 534 U.S. 951, 122 S.Ct. 347, 151 L.Ed.2d 262 (2001). Nevertheless, the power of the federal courts to safeguard the integrity of court orders "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, *are in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *New York Tel. Co.*, 434 U.S. at 174, 98 S.Ct. 364 (emphasis added) (internal citations omitted). Accordingly, the question is whether the enforcement of the arbitration award threatened the integrity of the district court's order approving the MDL settlement agreement so that an injunction was required to prevent it.

The district court appears to rest its decision that the injunction was necessary to protect the integrity of its order upon two conclusions. First, the court determined that the Millers, by advancing the theory that Silver's malpractice in the prior state lawsuit against Honda caused them to forgo "blue sky" damages that were not covered by the MDL settlement, made the scope of the MDL settlement a central issue in the California arbitration. Because the district court's

settlement order indicated the court intended to retain exclusive jurisdiction over the "implementation, *interpretation* and enforcement of the Settlement Agreement," J.A. 550-51, the district court reasoned that the arbitrator's consideration of whether "blue sky" damages were covered by the MDL settlement contravened the court's settlement order because it required an interpretation of the settlement agreement. *See In re: American Honda Motor Co. Litigation*, 162 F.Supp.2d 387, 395 (D.Md.2001).

With respect, I cannot conclude that the arbitration award, arising from a California state malpractice action, threatened the integrity of the district court's order. The Millers are not attempting to recover, directly or indirectly, any additional damages from Honda. They are not relitigating any of their claims against Honda that were resolved in the MDL litigation or otherwise collaterally attacking the district court's settlement order. The Millers's claims in arbitration involved the completely distinct legal issue of whether, under California law, Silver committed malpractice in a prior state action that was never before the district court. In my view, there is simply no reason to believe the MDL settlement order would be undermined by the enforcement of the arbitration award against Silver.

In concluding that the arbitration award does not threaten the integrity of the district court's settlement order, I would emphasize that the proper analytical focus is on whether the injunction qualified as an exercise of power "in aid of" jurisdiction under the statute, as opposed to whether and to what extent the settlement order purported to retain jurisdiction over matters related to the MDL litigation. The district court's authority to protect its orders under the All Writs Act did not turn on whether the court had retained jurisdiction to do so. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) ("Federal courts . . . possess only that power

authorized by Constitution and statute, which is not to be expanded by judicial decree." (internal citations omitted)). Thus, the only significant question in assessing the district court's authority under the All Writs Act was whether that statute was satisfied.

Finally, the district court's other conclusion serving as a basis for the injunction was that *during the arbitration*, the Millers intentionally misrepresented the nature of the MDL settlement and the facts and circumstances surrounding it. The district court suggested that it was necessary to enjoin the enforcement of the California arbitration award to prevent the Millers from benefiting from their misrepresentations about the scope of the damages awarded under the MDL settlement. *See In re: American Honda Litigation*, 162 F.Supp.2d at 394-95 n. 7 ("[A]lthough I find that the arbitrator erred in his apparent findings, I am enjoining the award he entered not because of any mistake he made but because the Millers had no right to make before him the deceptive arguments they did, misrepresenting what had occurred during the Honda bribery litigation."). The fact that the Millers misrepresented to the California arbitrator what occurred in the MDL litigation does not, in and of itself, threaten to undermine the district court's settlement order. Even if the misrepresentations resulted in an arbitration award that was erroneous on the merits, such an award, for the reasons previously stated, does not threaten the integrity of the settlement order.

In sum, I would respectfully hold that the district court abused its discretion in issuing the injunction as it was not a proper exercise of power "in aid of" jurisdiction under the All Writs Act.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MDL Case No. 1069

S & R AUTO SALES, INC., *et al.*

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*

Aug. 24, 2001

IN RE: AMERICAN HONDA MOTOR COMPANY, INC., DEALERSHIPS RELATIONS LITIGATION

OPINION

MOTZ, District Judge.

Ruth and Roger Miller, the principals of S & R Auto Sales, Inc., were members of the plaintiff class in these proceedings. The Millers received $6.32 million in the settlement of *Borman I* and are due to receive $700,000 more in the event that *Borman II* is affirmed on appeal. The present dispute involves the question of whether they are entitled to recover an additional $7,475,000 for "blue sky" damages by enforceing an arbitration award they obtained on a claim for alleged professional malpractice against Lawrence Silver and his firm ("Silver"), their former counsel in *Honda*-related litigation.

For the reasons that follow, I have concluded that the Millers made arguments in the arbitration proceeding that depended in large measure upon a deceptive analysis of what occurred in the Honda MDL proceedings. I have also concluded that this court has inherent jurisdiction to prevent

the MDL proceedings from being used to effect the miscarriage of justice that enforcement of the arbitration award would entail. Accordingly, I will enjoin the Millers from enforcing the award.

I.

A.

The Millers purchased Huntington Beach Honda from Ed Smith and Scott Robinson for $7 million at the end of 1986. A portion of the purchase price was to be paid over time, and the Millers personally guaranteed promissory notes given to the sellers. The Millers defaulted on the notes, and in March 1994, the widow of Ed Smith brought suit against them in the Superior Court of California for Orange County.

The Millers, who were not then represented by Silver, filed a cross-complaint against Mrs. Smith and joined Mrs. Robinson, the widow of Scott Robinson, as a defendant on the cross-complaint. In July 1994, Silver took over representation of the Millers, and on April 11, 1995, he filed on their behalf a First Amended Cross-Complaint in the state court proceeding. Silver named American Honda as a defendant in the First Amended Cross-Complaint and asserted RICO and common law fraud claims arising of the Honda bribery scandal that eventually became the subject of these MDL proceedings.[1]

Honda filed a demurrer to the RICO claim in the First Amended Cross-Complaint on the ground that the Millers had failed to plead legally sufficient RICO damages. On November 9, 1995, Judge Tully Seymour, to whom the case was assigned, sustained the demurrer without leave to amend but "without prejudice to the cross-complainants filing a motion to reconsider the Court's decision denying leave to

[1] I will refer to American Honda and its affiliates as "Honda" throughout this opinion.

amend. . . ." In accordance with this order, Silver filed a motion for reconsideration. Judge Seymour denied the motion.

The relationship between the Millers and Silver deteoriated and, after the Millers threatened to assert claims for malpractice against Silver, he withdrew his appearance. Thereafter, against Silver's advice, the Millers voluntarily dismissed the claims they had filed in the California state court action and refiled them in the United States District Court for the Central District of California. The case was transferred to this court as part of the MDL proceedings. Honda then filed a motion to dismiss on the ground that the voluntary dismissal of the California action after the sustaining of a demurrer constituted a dismissal with prejudice. At a telephone hearing in early July 1998, I indicated that I was inclined to refer the issue to the California courts to determine the effect of the dismissal. However, the intervening MDL settlement, which the Millers accepted, made it unnecessary for me to seek guidance from the California courts on the issue.

B.

The Millers were represented in the MDL proceedings by the firm of Duane, Morris & Heckscher ("Duane/Morris"). Duane/Morris represented several other plaintiffs as well, and members of the firm served on the plaintiffs' executive committee. The Millers also personally participated in the settlement approval process, writing to the court on September 21, 1998, requesting that there be a delay of 60 days in order to permit time for a review attorneys' fees issues. I denied the request. Nevertheless, the Millers chose to accept the settlement.

The $6.32 million the Millers received was the highest amount received by any dealer. In fact, it was $1 million too high under the allocation formula that was used in determining the amounts to be paid to settling class members. The

formula contemplated that each dealer would be paid $4,000 for each car which, as determined by a regression analysis, the dealer had not received because of the bribery scheme. Some dealers, like the Millers, purchased their dealership during the class period, and were entitled to compensation only for those cars that were apportioned under the settlement formula to the dealership after the date of their purchase. This apportionment ordinarily was easy to accomplish because—apparently in all cases other than the Millers—Honda assigned a new dealer number when the dealership changed hands. The Millers, however, were given the same dealer number as their predecessors and therefore received an apportionment of all of the cars to which their dealership was entitled in 1986 despite the fact that they did not purchase the dealership until mid-December of that year. This resulted in a misapportionment to them of 250 cars, which in turn resulted in an excess recovery of $1 million. The error apparently was known both to the Millers and Duane/Morris when the Millers decided to accept the MDL settlement.

C.

After I had approved the settlement, Silver filed a lien against the settlement proceeds due to be distributed to the Millers. The lien was based upon a claim of compensation for work Silver had performed for the Millers in their California state action. Silver requested that I adjudicate the merits of both his fee claim and the claim for malpractice that the Millers were asserting against him. I declined to exercise jurisdiction to adjudicate the claims, finding (based upon what the Millers represented to me) that California state law would predominate in their resolution. The Millers then filed a malpractice action against Silver in the Superior Court of California and Silver counterclaimed for fees. In accordance with California law (and at Silver's insistence), the matter was referred to arbitration. After 15 days of hearings, the arbitrator—without issuing a written or oral decision—ruled

in favor of the Millers, awarding, *inter alia*, $7,475,000, in "blue sky" damages to compensate them for an amount he found they had overpaid for the goodwill of their dealership. He subsequently entered a supplemental award granting the Millers attorneys' fees and costs in the amount of $871,474.96. The arbitrator did not make any award to the Millers for "allocation damages," apparently because he was persuaded that the Millers had received fair compensation for such damages in the MDL proceedings.

After the arbitration award was issued, Silver filed a motion before me asking that I reconsider my decision not to adjudicate his fee/malpractice dispute with the Millers and to exercise jurisdiction over the parties' respective claims. The motion has been fully briefed and argued.[2] The Millers have agreed not to seek enforcement of their arbitration award pending my decision.

II.

A.

The theory espoused by the Millers during the arbitration proceedings in support of their claim for blue sky damages was relatively straightforward.[3] According to the Millers,

---

[2] The arbitrator awarded the Millers an additional $475,567.51 for alleged acts of malpractice they asserted against Silver not directly related to the claims arising from the Honda bribery scheme. Silver has raised several issues about this portion of the award as well, and he requests that I reconsider my decision not to adjudicate all aspects of his dispute with the Millers. I decline to do so out of respect for the limits of my jurisdiction and authority.

[3] During oral argument on the present motion in this court, counsel for the Millers indicated that in addition to the theory of malpractice I describe in the text, the Millers also may have suggested in the arbitration proceeding that Silver was negligent in filing their claims against Honda in state rather than federal court in the first instance. However, the post-hearing briefs submitted by the Millers in the arbitration proceeding clearly demonstrate that the principal, if not exclusive, theory they were

Judge Seymour had sustained Honda's demurrer in the litigation in the Superior Court for Orange County because Silver had misplead RICO damages by not claiming "concrete financial loss" as required by the decision in *Sheperd v. American Honda Motor Co.*, 822 F.Supp. 625 (N.D.Cal.1993). Further, according to the Millers, Silver knew how to plead damages properly because in the case of *Austin Motors v. American Honda*, which he filed on behalf of other clients in the Central District of California and which was transferred here as a part of the MDL proceedings. I overruled a motion to dismiss filed by the Honda defendants on *Sheperd* grounds. The sustaining of the demurrer in the California case led to the Millers' decision to dismiss that action. That dismissal, in turn, led to the motion to dismiss the Millers' claims filed by Honda in this court. Honda's motion was still pending before me when the MDL settlement was reached, and the Millers assert that their fear that I would grant the motion lead them to accept the settlement instead of opting out. Finally, they contend, that if they had opted out, they would have pursued their case against Honda and received both the allocation damages they received as part of the MDL settlement and the blue sky damages they allegedly suffered as a result of having overpaid for their dealership.

B.

There are five flaws in the Millers' theory.

First, no one familiar with the Honda bribery scheme litigation could reasonably conclude that Silver's alleged malpractice in not pleading RICO damages properly in the Millers' California state action is what caused Judge Seymour

---

pursuing was the one I describe. In any event, as discussed *infra*, it is entirely speculative to assume that the Millers would have been able to recover blue sky damages if they had originally filed an action in federal court (which, in due course, would have been transferred here by the MDL Panel).

to sustain Honda's demurrer. The problem that the Millers confronted in California was not one of pleading. Rather, their problem was that Judge Seymour found persuasive the holding in *Sheperd* that a plaintiff alleging a RICO violation arising from the Honda bribery scheme must plead facts showing a direct nexus between the payment of bribes and the loss of "specific sales which . . . [he] would have made in the absence of diversionary tactics by defendants." 822 F.Supp. at 630. Indeed, the court in *Sheperd* suggested the Ninth Circuit's requirement of "concrete financial loss" in RICO cases might obligate a RICO plaintiff to show that he has "actually paid money out as the result of racketeering activity." 822 F.Supp. at 628. Silver correctly contends that even today, after the extensive litigation in the MDL proceedings that resulted in the global settlement, no individual dealer could meet the *Sheperd* pleading standard. The damages model that plaintiffs ultimately developed did not tie the loss of any single dealers' specifically identifiable sales to the payment of bribes but established only a system-wide misallocation of cars that generally favored bribe-paying dealers over non- bribe-paying dealers.

Furthermore, when asking Judge Seymour to reconsider his ruling sustaining Honda's demurrer in the California litigation, Silver submitted a motion and affidavit setting forth in somewhat more detail than did the First Amended Cross-claim what the Millers would allege, if granted leave to amend, about the Honda bribery scheme's adverse effects upon them. He also attached as an exhibit to his affidavit the complaint he had filed on behalf of other clients in the *Austin Motors* case. *Austin Motors* was eventually transferred to me as part of the MDL proceedings, and the complaint in that case was among the ones I considered when I denied Honda's initial motion to dismiss raising, *inter alia*, plaintiffs' alleged failure to plead RICO damages sufficiently. As my opinion deciding that motion reflects, *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F.Supp. 528, 539-40

(D.Md.1996), the reason I reached a different conclusion than did the *Sheperd* court (and thus Judge Seymour, who followed *Sheperd*) was not any difference in the way the RICO damages were plead in the different cases. I simply imposed (rightly or wrongly) a less exacting pleading standard.

The second fallacy in the Millers' theory is that even assuming Silver misplead RICO damages in their California action, that misfeasance was not the precipitating event which allegedly placed the Millers on the horns of a dilemma in deciding whether to accept the MDL settlement. Rather, their predicament was caused by their voluntary dismissal of the California action after Silver no longer represented them and against his advice. Honda's motion to dismiss the Millers' federal action that was pending before me at the time the MDL settlement was reached was based entirely on the argument that under California law, since the voluntary dismissal had been effected after the sustaining of a demurrer, it was with prejudice. Of course, if Judge Seymour had not sustained the demurrer to the RICO claim, the Millers arguably would not have dismissed the California action.[4] That fact, however, provides too indirect a nexus to the Millers' claimed damages. If they had not voluntarily dismissed their California action, at the time the settlement in the MDL was reached their RICO claims would have been capable of being revived on appeal. Moreover, the Millers

---

[4] It is not, however, entirely clear that the Millers would not have dismissed the California action in any event. One of the briefs they filed in the arbitration proceeding reflects that the attorney who advised them to file the notice of dismissal and refile their claims in federal court erroneously believed that it was necessary for them to have a federal action pending for their case "to be part of a settlement . . . in a larger action." In fact, the plaintiff class certified (for liability purposes) in the MDL action included all non-bribe paying Honda dealers who had been injured by the bribery scheme, whether or not they had an individual action pending in federal court. The MDL settlement eventually encompassed all such dealers as well.

had a common law fraud claim against Honda as to which no demurrer was ever sustained in the California litigation. Thus, it was the voluntary dismissal of the California litigation (which, to repeat, Silver advised against), not any pleading failure by Silver, that—taking the Millers at their word—forced them to accept the MDL settlement instead of continuing to pursue their blue sky claim.

Third, the settlement agreement in the Honda MDL proceedings conferred exclusive jurisdiction upon this court to interpret that agreement. One of the terms defined in that agreement was "allocation damages." Thus, to the extent that the Millers prompted the arbitrator to award them "blue sky" damages by arguing that such damages were something different from "allocation" damages as defined in the settlement agreement, they caused the arbitrator to usurp the exclusive jurisdiction of this court.

Furthermore, on the merits of the interpretative issue itself, the Millers' argument was incorrect. As I have earlier indicated, the blue sky damages award was intended to compensate the Millers for overpaying Smith and Robinson for the goodwill of their dealership. Goodwill had been calculated for purposes of the purchase agreement as a multiple of the dealership's prior earnings. Its value was found by the arbitrator to have been inflated because the earnings on which it was based were themselves inflated by the sale of cars that had been allocated to the dealership by corrupt Honda executives in return for bribes that Smith and Robinson had paid. Although the damage for overpayment of goodwill is somewhat conceptually different from damages that the Millers suffered by misallocation of automobiles to them after they had purchased the dealership, the two types of damage are economically interrelated. From one perspective, the recovery the Millers received through the MDL settlement for automobiles they should have received but for the bribery scheme substantially compensated them for the full revenue

stream for which they had paid when they purchased the dealership. In any event, economics aside, the settlement agreement in the MDL settlement defined "allocation claims" to encompass "any claim, allegation or assertion arising in any way from the allocation or distribution of Honda automobiles. . . ." Under this definition the blue sky damages the Millers received in the arbitration proceeding clearly were not distinct from, but one of the aspects of, allocation damages.

Fourth, as they now concede, the Millers received in the MDL settlement $1 million more than they were entitled to for "allocation damages" as they restrictively define it. This $1 million overpayment bore directly upon their blue sky claim and, at the least, would have to be deducted from that claim. Yet they failed to reveal to the arbitrator that they had received this overpayment.

Fifth, in awarding the Millers damages on their blue sky claim, the arbitrator necessarily was assuming that they would have recovered on that claim if they had not accepted the MDL settlement and continued to litigate against Honda. This assumption was entirely speculative. When advising the Millers to accept the MDL settlement, Duane/Hechsler opined in a letter to them that "it is unlikely that a court would find that Honda was liable for . . . [blue sky] damages" because they were "not proximately caused by American Honda." Whatever a particular court might eventually hold, it surely was sound advice to point out the substantial risk of nonrecovery that the Millers faced on their blue sky claim. I was never called upon to decide the question and, absent full briefing and argument, I do not know how I would rule upon it. However, I recognize that there is a clear distinction between, on the one hand, holding Honda liable for damages its corrupt executives directly caused to non-bribe-paying dealers by diverting from them cars to which they were entitled and, on the other hand, attempting to hold Honda liable for damages incurred by the purchaser of a dealership

who overpaid for goodwill to a corrupt dealer whose profits had been inflated by his payment of bribes. As Duane/Morris advised the Millers, the doctrine of proximate cause makes this distinction an extremely important one.[5]

III.

The Millers argue that however great the injustice their fallacious arguments in the arbitration proceeding may have created, this court is powerless to remedy it. They contend that my original decision not to exercise jurisdiction over this dispute was correct and that Silver's motion to reconsider was untimely. They point to the strong federal policy favoring

---

[5] Of course, I can attest from personal knowledge to the speculative nature of the arbitrator's assumption only in regard to the MDL proceedings. However, to the extent that the Millers' theory is they would never have dismissed their California action if Silver had properly plead their damages there, the speculative nature of the arbitrator's assumption is objectively clear. Although I would not presume to speak for the California appellate courts, Judge Seymour, who took a more restrictive view of RICO damages than did I, certainly would not have permitted recovery for blue sky damages. (In that regard, it is interesting to note that *Sheperd*, upon which Judge Seymour relied, involved what might be characterized as "reverse blue sky damages," i.e., the diminished sales price the plaintiff received when forced to sell his business because he had not paid bribes). And, as I have explained in the text, it was not Silver's fault that appellate review of Judge Seymour's ruling sustaining Honda's demurrer was foreclosed since he had advised the Millers against dismissing the California action.

There is another even more fundamental point that must be noted because it undercuts the very idea that Silver erred in the manner that he plead damages in the California action. Ironically, Silver—who is accused of malpractice—anticipated the distinction between direct misallocation damages caused by wrongful diversion of cars from an active, non-bribe-paying dealer and the more speculative blue sky damages suffered by the purchaser of a dealership from a bribe-paying dealer. He actually plead both. *See* First Amended Cross-Complaint, ¶¶ 22, 23, 24 (alleging blue sky damages), and ¶ 25 (alleging direct misallocation damages).

arbitration, and they assert that, federal policy aside, this court lacks jurisdiction to review an arbitration award entered in a California state proceeding. Finally, in response to an argument made by Silver, they deny that they are estopped from asserting a malpractice claim for blue sky damages against him simply because they accepted a settlement in an MDL proceeding.

The general propositions upon which the Millers rely are sound. I continue to believe that on the facts as they were then represented to me, I was correct in declining to exercise jurisdiction over competing claims for fees and malpractice that arose in a California state action and appeared to involve issues of California law.[6] The time provided by this court's Local Rule 105.10 for filing a motion to reconsider has long since passed and, if the facts now presented to me had not substantially changed since my original decision, I would not exercise the authority I possess to suspend that rule. *See L.R.* 604. I clearly recognize and respect the federal policy favoring arbitration, and I would never in the ordinary course arrogate to myself jurisdiction to enjoin enforcement of an arbitration award entered in a state court proceeding.[7] Nor do

---

[6] Silver points out that after my initial ruling in this case, I have exercised jurisdiction over several other fee disputes. However, those disputes were different from the dispute between Silver and the Millers in that they related, directly or indirectly, to fees paid to the attorneys for the class in the MDL proceedings, not to an individual fee dispute between an attorney and his client in a related state court action. Recently, in one of the instances in which I originally adjudicated a fee dispute, I have extended my jurisdiction to reach a claim asserted by an attorney against her client for services she rendered individually to him in monitoring the MDL proceedings and advising him on whether to accept the MDL settlement. I have done so, however, because that attorney previously asserted a claim against lawyers who represented the class for a portion of the class action fees. I denied that claim, and the attorney's present claim against her client appears in substantial part to mirror it.

[7] I also recognize that an arbitration award may not be vacated except under extremely narrow circumstances. *See, e.g., First Options of*

I question the validity of the Millers' contention that under California law a party may pursue a legal malpractice action against an attorney whose negligence allegedly caused an inadequate settlement. *See, e.g., Tchorbadjian v. W. Home Ins. Co.*, 39 Cal.App.4th 1211, 46 Cal.Rptr.2d 370 (1995); *Pompilio v. Kosmo, Cho & Brown*, 39 Cal.App.4th 1324, 46 Cal.Rptr.2d 409 (1995).

This case, however, turns not on general principles but on its particulars. Were I not to grant relief to Silver, I would be permitting the MDL proceedings over which I presided to become a vehicle for the commission of a substantial injustice. The Millers actively participated, both through their counsel and in a *pro se* capacity, in the MDL proceedings. They received a substantial settlement from it, including $1 million more than they were entitled to under the allocation formula. They knew that in order to approve the settlement, I would have to find that it was "fair, adequate and reasonable" for all members of the class, including

---

Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 34, 108 S.Ct. 364, 369, 98 L.Ed.2d 286 (1987); *Mountaineer Gas Co. v. Oil Chem. & Atomic Workers*, 76 F.3d 606, 608 (4th Cir.1996); *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir.1991). However, the cases reciting this rule ordinarily arise where a party is seeking to vacate an award based upon an alleged error intrinsic in the arbitration proceeding itself, such as the failure of the arbitrator to follow settled precedent, arbitrariness in fact-finding, or an inherent structural deficiency involving alleged corruption or the like. Here, although I find that the arbitrator erred in his apparent findings, I am enjoining the award he entered not because of any mistake he made but because the Millers had no right to make before him the deceptive arguments they did, misrepresenting what had occurred during the Honda bribery litigation. Moreover, the very existence of the "narrow circumstances" exceptions demonstrates that arbitration awards are not sacrosanct and should not be enforced if to do so would violate public policy. It would surely constitute a violation of federal policy to permit MDL proceedings to be used as a vehicle of injustice.

persons, such as themselves, who had allegedly overpaid for their dealerships because of the bribes paid by their predecessors. They never disclosed at the time they accepted the settlement their own view that the settlement was, in fact, unfair, inadequate, and unreasonable because it did not compensate them and similarly situated class members for their blue sky damages. Nor did they reveal that they were reserving their right to pursue such a claim against their former attorney.

Moreover, when opposing Silver's original motion requesting that I exercise jurisdiction over this dispute, the Millers misrepresented that issues of state law would predominate in resolution of the dispute. They did not disclose that they would be asserting in the arbitration proceeding a legal malpractice theory that would require an intimate knowledge of the legal issues involved in the Honda MDL proceedings. They also did not reveal that one of the contentions they intended to make in the arbitration proceeding was that the blue sky damages they were seeking were distinct from the allocation damages they had recovered in the MDL settlement. Resolution of that issue involved interpretation of the MDL settlement agreement and, as the Millers knew, the settlement agreement conferred exclusive jurisdiction upon this court to interpret its terms.

Most importantly, for the reasons I have previously stated, the Millers made arguments before the arbitrator about the Honda-related litigation that were so totally without merit that they can only be characterized as untrue. They also withheld from the arbitrator that they received $1 million for 250 cars apportioned to them before they purchased their dealership.

The global settlement of the claims arising from the Honda bribery scheme was an asset, both financial and juridical in nature, created under the auspices of the MDL proceedings. Those who accepted its benefits have no right to obtain further recovery (either from Honda or any third parties) by

misrepresenting to another tribunal that which led to its accomplishment. This is what the Millers have done. Therefore, I am satisfied that in order to protect the integrity of this court's processes and prevent the Honda MDL proceedings from being used for an improper purpose, I have jurisdiction and authority under the All Writs Act, 28 U.S.C. § 1651, to enjoin the Millers from enforcing the portion of the arbitration award relating to blue sky damages.[8] That injunction is being entered herewith.

ORDER

For the reasons stated in the accompanying opinion, it is, this 24th day of August 2001

ORDERED

1. The motion filed by the law firm of Silver & Field and Lawrence Silver for adjudication of matters relating to this court's order of October 9, 1998 and for reconsideration of this court's order of April 22, 1999 is granted;

2. Ruth and Roger Miller are enjoined from enforcing that portion of the arbitration award entered in their favor on January 10, 2001 against Lawrence Silver, an individual, Lawrence Silver & Associates, a law corporation, Lawr-

---

[8] As indicated earlier in the text, the arbitrator entered a supplemental award in favor of the Millers in the amount of $871,474.96 for attorneys' fees and costs. This award was premised upon an underlying award in the amount of $7,950,567.51, all but $475,567.51 of which was for blue sky damages. The order I am entering also enjoins the Millers from enforcing the supplemental award but provides that I will permit them to file a motion in this court requesting me to determine the amount of attorneys' fees and costs they incurred in connection with their blue sky damages claim. After determining that amount, I will modify the injunction to permit the Millers to enforce the remaining portion of the supplemental award.

ence Silver, a law corporation, and Silver & Field, a law corporation, to the extent that the award grants them $7,475,000 for "blue sky damages;" and

3. The Millers are enjoined from enforcing the supplemental award for attorneys' fees and costs entered in their favor on March 20, 2001 in the arbitration proceedings, provided, however, that the Millers may file a motion in this court requesting me to determine the amount of attorneys' fees and costs they incurred in the arbitration proceedings in connection with their blue sky damages claim. After determining that amount, I will modify this injunction to permit the Millers to enforce the remaining portion of the supplemental award.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. MDL-1069

S & R AUTO SALES, INC., *et al.*
Plaintiffs,

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*
Defendants.

IN RE: AMERICAN HONDA MOTOR COMPANY, INC., DEALERSHIPS RELATIONS LITIGATION

MEMORANDUM

S&R Auto Sales, Inc., Beverly Hills R&R, Inc., Roger Miller Imports, Inc. and Ruth and Roger Miller (collectively "the Millers"), have filed a motion to strike the notice of lien filed by Silver & Field against the Millers' share of the settlement proceeds in *In re American Honda Motor Company, Inc. Dealership Relations Litigation*, MDL-1069. The motion will be denied.

I.

In 1986, Ed Smith and his partners sold both a corporate entity, S&R Auto Sales, Inc., and a Honda dealership, Huntington Beach Honda, to Ruth and Roger Miller. In March 1994, Ed Smith's widow, Dorothy Smith, filed a lawsuit in the Superior Court of California on behalf of her husband's estate against the Millers for breach of contract. Through their then-attorney, Robert Lewin, the Millers filed a cross-claim against Ed Smith's estate and his partners. The Cross-Complaint focused on claims involving contamination and

waste problems at the dealership that were not disclosed to the Millers prior to sale, and included only scant mention of the Honda bribe scheme. In July 1994, the Millers discharged Lewin as their attorney and signed a retainer agreement with Lawrence Silver & Associates.[1]

In April 1995, in a criminal trial in New Hampshire, S. James Cardiges testified that Ed Smith and one of Smith's partners had paid him significant sums over the years in exchange for favorable allocation of cars. Based largely on this testimony, the Millers filed a First Amended Cross-Complaint that included RICO claims and common law claims for fraud, negligence, negligent misrepresentation and unfair business practices against Honda. Because of the limited nature of the Millers' claims against the original defendants, however, the sate court limited discovery to exclude information relating to a "global conspiracy" at American Honda, and declined to consider testimony from the New Hampshire criminal trial.

In September 1995, Honda filed a motion to stay the proceedings in the Millers' case pending an administrative hearing by the California New Motor Vehicle Board ("CNMVB"), and filed a general demurrer on the grounds that the Millers' First Amended Cross-Complaint failed to state a cause of action against Honda. On November 9, 1995, the Superior Court judge issued a Minute Order sustaining Honda's general demurer without leave to amend. The order stated "this ruling is without prejudice to the cross-complainants filing a motion to reconsider the Court's decision to deny leave to amend, stating with specificity how they would amend the Cross-Complaint to overcome the deficiencies referred to above." The same Minute Order granted Honda's motion to stay the action pending review by the CNMVB.

---

[1] Silver & Associates subsequently changed its name to Silver & Field. Hereinafter, the firm will be referred to as "Silver."

In December 1995, the Millers filed a Motion for Clarification and/or Reconsideration of the November 9 Minute Order. The Superior Court issued a second Minute Order, after considering the reconsideration portion of the motion, that reconfirmed the Court's prior ruling with regard to the RICO claims, but modified the first order to sustain the general demurer as to *the state causes of action* with leave to amend upon completion of the administrative proceedings.

On March 20, 1996, Silver wrote to the Millers, requesting that they pay half of their outstanding attorneys' fees and all of their costs. Shortly thereafter, Silver withdrew as counsel of record for the Millers.

On August 12, 1996, the Millers retained Duane, Morris & Hecksher as their counsel. On December 2, 1996, the Millers prevailed in their appeal from the portion of the Minute Order requiring exhaustion of the administrative remedies. On December 10, 1996, they voluntarily dismissed, without prejudice, their Cross-Complaint as to Honda only. They filed a complaint in federal court, along with a Notice of Tag Along Action pursuant to MDL rules, on the next day, December 11, 1996. The complaint filed in federal court included more detail about the various RICO claims and more explicit allegations of concrete injury to the Millers.

Honda filed a motion to dismiss the Millers' federal complaint on collateral estoppel grounds. The motion was not decided before the MDL settlement in the summer of 1998. On January 19, 1999, Silver filed in this Court a notice of lien against the Millers' settlement proceeds. The alleged basis for the lien is the work performed by Silver in pursuing the Millers' state court action.

II.

Two distinct issues are presented in the parties' memoranda: (l) whether this Court has jurisdiction to adjudicate the

merits of the lien; and (2) whether the notice of the lien should be stricken. I find that the answer to both questions is no.

A.

California law requires that attorney seeking to enforce a lien file a separate action to do so. *See e.g. Valenta v. Regents of the Univ. of California*, 282 Cal. Rptr. 812, 815 (Cal. Ct. App. 1991). The requirement is quite sensible because the dispute between the parties to the original action has ended and a new dispute, which may involve entirely new parties (attorneys competing for the fees), has arisen. The threshold question which a court must ask before entertaining any dispute is whether it has jurisdiction to resolve it. Here, I have neither federal question nor diversity jurisdiction over the dispute between Silver, the Millers, and Duane, Morris & Hecksher.

Silver cites *Kalyawongsa v. Moffett*, 105 F.3d 283 (6th Cir. 1997), for the proposition that federal district courts possess ancillary jurisdiction to reduce attorney liens to judgment. *Kalyawongsa* itself, however, recognizes that federal courts have reached contradictory conclusions on that issue. *See id.* at 287. In addition, the *Kalyawongsa* court determined that the law of Tennessee permitted a court handling an underlying action to "determine the amount of the lien and reduce it to judgment." *Id.* at 288. California law is not the same.

Moreover, the facts in *Kalyawongsa* differ significantly from the instant facts. In that case, the attorney asserting the lien before the federal court had appeared in that court on the former client's behalf in the underlying action. In contrast, Silver did not appear before this Court on the Millers' behalf in the MDL. Therefore, the relationship between the instant fee dispute and the federal action is minimal.

I recognize that the class action settlement agreement purports to confer exclusive jurisdiction upon me to resolve

attorneys' fee disputes arising under or related to the agreement. I also recognize that, to some extent, the interest of judicial economy might be served by my resolving this dispute in light of my familiarity with the MDL litigation.[2] However, neither the parties' agreement nor considerations of judicial economy suffice to create subject matter jurisdiction which does not otherwise exist.

B.

The remaining question is whether Silver's notice of lien should be stricken. In order to strike the notice of lien, I would presumably have to determine that Silver, under the terms of the retainer agreement signed by the Millers, has no right to enforce the lien in question. There is some question whether I could make that determination because I do not have jurisdiction to reach the merits of the fee dispute. In any event, I cannot reasonably determine at this juncture that Silver has no such right because the language of the retainer agreement is ambiguous. The Millers grant Silver & Associates "a lien on all claims that the [Millers] may have where [Silver & Associates] is representing the Millers in such matter(s)." Because it is unclear whether the Millers' federal action and state action involved the same "matters," I cannot conclusively determine that Silver & Field has no right to enforce the lien, and I will not strike the notice. Any further effort to enforce the lien, however, will have to be adjudicated in a separate state court action.

---

[2] I note, however, that the fee dispute at issue arises out of work performed by Silver in state court and administrative actions in California. Therefore, the knowledge that a California judge would have of Silver's relevant work is approximately equal to my own. Furthermore, the attorney fee agreement at issue is governed by California law, about which California judges are more knowledgeable than I.

For these reasons, the Millers' motion to strike notice of lien will be denied. A separate order to that effect is being entered herewith.

April 22, 1999
Date

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. MDL-1069

S & R AUTO SALES, INC., *et al.*
Plaintiffs,

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*
Defendants.

IN RE: AMERICAN HONDA MOTOR COMPANY, INC., DEALERSHIPS RELATIONS LITIGATION

ORDER

For the reasons stated in the memorandum entered herewith, it is, this 22nd day of April, 1999

ORDERED

1. the Millers' motion to strike notice of lien is denied; and

2. any further proceedings related to enforcement of the lien must be brought in a separate action in state court.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MDL-1069
Civil No. JFM-96-8624

S & R AUTO SALES, INC., *et al.*

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*

IN RE: AMERICAN HONDA MOTOR COMPANY, INC., DEALERSHIPS RELATIONS LITIGATION

ORDER

For the reasons stated on the record on June 21, 1999, it is, this 22nd day of June 1999

ORDERED

1. The motion filed by Ruth and Roger Miller, et al. to reconsider this court's order of April 22, 1999 is denied, subject to the understandings expressed by this court on the record; and

2. If it deems it appropriate to do so, the California court in which the dispute between the Millers and the law firm of Silver & Field is pending may order the Settlement Administrator in this MDL litigation to release to the Millers (or, alternatively, the firm of Silver & Field) their alleged share of the Honda settlement proceeds.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

95-MD-1069

IN RE: AMERICA HONDA MOTOR
MDL PROCEEDINGS

Telephone Conference was held in the above referenced case on June 21, 1999 before the Honorable Frederick Motz.

* * * *

THE COURT: Again, we are getting into asceteric [*sic*] issues. I am a practical person. I think I have enough jurisdiction over the funds, without the dispute which should be out in California. I don't want to be releasing those funds. I don't want Mr. Ulwick to be doing it. It is a notice of the lien. We know about it. The fund is in existence because of what happened here. It is almost like a stockholder. I mean one way to do it would be for me to order Mr. Ulwick to deposit them in a—filing an interpleader action in California, but frankly I think that is—I don't think that should be something he should have to do, and I think I got simply enough jurisdiction over the fact of these funds that when I have been given notice that there is a dispute somewhere that I ought to tell the claims administrator, just hold on to the money.

Now, less [*sic*] there be any problems about a state court would feel they were stepping on my toes or anything of that nature, it seems to me that Mr. Baylson as I think Mr. Field just said; if you want to go to California and have the California court indicate, and as far as I am concerned they can rule that Mr. Ulwick should turn the money over. If Mr. Ulwick then feels comfortable doing it, that is fine with me and it is not that somehow by doing that the state court judge

would be—I certainly would be amenable to that, but frankly I still see this whole thing of coming into existence because of what happened in the NBL [*sic*]. We are on notice of this dispute.

I am going to leave it for the California courts to decide it, but I don't think one side or the other should be paid yet, and it seems to me to be absolutely meaningless act and waste of judicial resources, and of the claims administrator's time and putting him with unnecessary work by saying Mr. Ulwick files and [*sic*] interpleader action in California. I have notice of the lien. And unless you object, I am willing to say right here and now. It is Mr. Baylson who wants it released is absolutely free to go to the California court and I certainly would—would not deem it to be an interference with my jurisdiction, maybe as a matter of commenting on something and because of the position Mr. Ulwick would find himself in the order could be—well, as far as I am concerned Mr. Ulwick would you take an order from the California court to release the funds?

MR. ULWICK [class counsel]: Yes, sir, I would.

THE COURT: As far as I am concerned, that is fine and you don't need any further order from me or anything else.

Mr. Baylson, go to California, if California says those funds ought to be released right now, that is fine. But I don't think it is the appropriate thing for me to do. It is the California court that is going to be reviewing the merits of this. They can take a look at it but Mr. Ulwick is holding those funds really under the auspices of the Court.

I am perfectly willing to have them paid out, but if the California court wants it to be done, the California court can order Mr. Ulwick to do it. It will not be an infringement on my jurisdiction, but I don't want to do it suosponte [*sic*]. I have to say enough practical jurisdiction over those funds how that came into existence because of what happened in the

NBL [*sic*]. I don't want them released to one side of the dispute where I express absolutely no merits on that, and if I say it was ambiguous, nobody should read into that, if I don't have jurisdiction that somehow an ambiguity means it has to go to the fact finder. That will be for California court to decide. For purposes of what should be done with this money.

I think there is enough of a dispute it would be inappropriate for me to pay one side out. The California court is perfectly free Mr. Baylson and tell them, and you can get a transcript or I will write them a letter saying if you think the money ought to be released to Mr. Baylson's clients, just order Mr. Ulwick to do it, and he has indicated he will accept the order and I certainly won't deem it to be an infringement on my jurisdiction in any way. Okay?

MR. BAYLSON [counsel for the Millers]: That is fine. Could we order—

MR. ULWICK: You may want to enter a formal order.

THE COURT: I will give an order denying the motion for the reasons stated and for the reasons stated and with the understanding expressed during the conference on blank date.

MR. PATT [counsel for the Millers]: Herbert Patt speaking. If I can impose on you for you to put within your order that the California court can issue an order if it deems fit for Mr. Ulwick to release the money, because there is a court action here [*sic*] and we certainly will take this up in court here [*sic*].

THE COURT: That is certainly all right. Is that right Mr. Field?

MR. FIELD [counsel for Silver & Field]: I don't have any objection to that. It has been our feeling all along that the California court has the jurisdiction over it and the order we are certainly going to comply with.

THE COURT: I have a recollection of what I am doing is consistent with what was done with at least one of the cases that was cited to me, but be that as it may, I will be glad to put that in the order and just see what the California court wants to do.

Thank you all very much.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed February 14, 2003]

No. 01-2194
CA-95-1069-MDL

In Re: AMERICAN HONDA MOTOR COMPANY, INCORPORATED, Dealerships Relations Litigation

---

ROGER MILLER; RUTH MILLER
Plaintiffs-Appellants

and

BERNARDI'S INCORPORATED, d/b/a Bernardi Honda, a Massachusetts Corporation (JFM-95-3314); PYE AUTOMOBILE SALES, INCORPORATED, (JFM-99-3136); RICHARD C.D. HUNT, III, (JFM-94-3499); PEGGY HUNT, (JFM-94-3499); RICK HUNT FORD, INCORPORATED, (JFM-94-3499); ROBERT J. VATLAND, (JFM-95-2415); METRO AUTO, INCORPORATED, d/b/a Metro Honda, (JFM-95-2493) formerly; DOMINICK ROCCO, (JFM-95-2493); SHIRLEY ROCCO, (JFM-95-2493); FLYNN MOTORS, INCORPORATED, d/b/a American Honda of Hammonton, (JFM-95-2494); JOHN J. FLYNN, JR., (JFM-95-2494); JANE MENDELSOHN, a/k/a Robert W. Mendelsohn, solely in her capacity as Executrix of the Estate of (JFM-95-2494); ROBBIN LINDSAY TORESCO, (JFM-95-2495); JACK REVELLE, (JFM-95-2517); ROCHESTER WORLD CAR CORPORATION, (JFM-95-2517); LIVERPOOL WORLD CAR CORPORATION, d/b/a Honda City, d/b/a Honda City, (JFM-95-2517); BILL MCDAVID PONTIAC, GMC

TRUCKS, HONDA, INCORPORATED, d/b/a Bill McDavid Honda, (JFM-95-2584); BILL MCDAVID MOTORS, INCORPORATED, d/b/a Bill McDavid Acura of Arlington, (JFM-95-2584); BILL MCDAVID, INCORPORATED, d/b/a Bill McDavid Acura of Fort Worth; VIC BAILEY HONDA, INCORPORATED, (JFM-95-2598); CLAUDIA CLOSE, d/b/a Jim Close House of Honda, d/b/a House of Honda, as Executrix of the Estate of James R. Close, Humphrey Motors, Inc.; HUMPHREY MOTORS, INCORPORATED, a/k/a Jim Close House of Honda, a California Corporation (JFM-95-2713); SIERRA MOTORS, INCORPORATED, d/b/a Sierra Motors, Incorporated, a Nevada Corporation (JFM-95-2712); JAMES MCKOANE ENTERPRISES, INCORPORATED, d/b/a Clawson Honda of Fresno, a California Corporation (JFM-95-2728); BREAKAWAY INCORPORATED, d/b/a Breakaway Honda, a South Carolina Corporation (JFM-95-2804) (JFM-95-2728); CENTURY LINCOLN-MERCURY, INCORPORATED, a South Carolina Corporation (JFM-95-2728); INTERNATIONAL MOTOR WERKS, INCORPORATED, d/b/a Honda Motor Works, a Wisconsin Corporation (JFM-95-3043); AUSTIN MOTORS, INCORPORATED, d/b/a Honda City, a New York Corporation (JFM-95-3044); STAFFORD HONDA, INCORPORATED, a Texas Corporation (JFM-95-3045); CITY MOTORS SALES COMPANY, a New Jersey Corporation (JFM-95-3046); PACE OLDSMOBILE, INCORPORATED, d/b/a Pace Honda, a New York Corporation (JFM-95-3047); AUTOSPORT, INCORPORATED, a New Jersey Corporation (JFM-95-3048); PENSACOLA AUTO MART, INCORPORATED, a Florida Corporation (JFM-95-3065); FRANK BORMAN, Col., a New Mexico resident (JFM-95-2716); FRED BORMAN, a North Carolina resident (JFM-95-2716); JEFF CONNOLE, d/b/a Borman Motor Company, a New Mexico resident, individually and doing business as (JFM-

95-2716); WILLIAM M. VAN DALSEN, a California resident (JFM-95-2716); WILLIAM J. BRONSON, an Oregon resident (JFM-95-2716); AL REILLY, a California resident (JFM-95-2716); MILDRED RADER, d/b/a Pioneer Honda, a California resident, individually and on behalf of all others similarly situated (JFM-95-2716); BORMAN MOTOR COMPANY, Limited Liability Company, (JFM-95-2716); PRECISION IMPORTS OF FARMINGTON, INCORPORATED, A New Mexico Corporation (JFM-95-2714); RANCOURT, INCORPORATED, d/b/a Carmichael Honda, (JFM-95-2715); TRANS OCEANIC MOTORS, INCORPORATED, d/b/a Cardinal Honda, (JFM-95-2695); CLAIR INTERNATIONAL, INCORPORATED, d/b/a Clair Honda, (JFM-95-3315); CLAIR'S INCORPORATED, d/b/a Clair Acura, (JFM-95-3315); JAMES E. CLAIR, (JFM-95-3315); RICHARD LUNDGREN, INCORPORATED, d/b/a Lundgren Honda, a Massachusetts Corporation (JFM-95-3313); BILL KRAUSE AUTOMOTIVE, INCORPORATED, a California Corporation (JFM-95-3414); WILLIAM A. KRAUSE, (JFM-95-3414); SAWYER AUTO IMPORTS, INCORPORATED, a Delaware Corporation (JFM-95-3417); BAY RIDGE HONDA, a New York Corporation (JFM-95-3418); RENSSELAER AUTO PLAZA, INCORPORATED, d/b/a Rensselaer Honda, (JFM-95-3416); ROMOR INVESTMENTS, INCORPORATED, formerly Crown Motors which did business as Century Motors, a California Corporation (JFM-95-3729); COOPER, INCORPORATED, d/b/a Selma Honda, a dissolved California Corporation (JFM-95-53); MILLER AUTO SALES, INCORPORATED, d/b/a Miller Honda-Volkswagon-Isuzu-Suzuki, a Virginia Corporation (JFM-96-382); KACHINA INVESTMENTS, INCOPORATED, a/k/a Wayne L. Culiver, a/k/a Wanyne Culliver Ford, Incorporated, a/k/a Hacienda Motor Company, Incorporated, an Arizona Corporation, as successor

in interest to (JFM-96-602); BLW, INCORPORATED, d/b/a Luby Chevrolet Company, Incorporated, formerly (JFM-96-637); FAIRFIELD MOTORS, INCORPORATED, a New Hampshire Corporation (JFM-96-1438); JACK BROWN IMPORTS, INCORPORATED, an Illinois Corporation (JFM-96-1506); SIERRA AUTO CARS, INCORPORATED, d/b/a Sierra Honda, a California Corporation (JFM-96-1504); POMONA VALLEY IMPORTS, INCORPORATED, a California Corporation (JFM-96-1504); MAJESTIC PONTIAC, d/b/a Majestic Honda, d/b/a Majestic Pontiac & Honda, a California Corporation (JFM-96-1504); KAISER BROTHERS, d/b/a Kaiser Brothers Oldsmobile & Honda, a California Corporation (JFM-96-1504); BOB JACKSON & SON, d/b/a Honda Santa Ana, a California Corporation (JFM-96-1504); COMMUNITY PONTIAC, d/b/a Community Pontiac Honda, d/b/a Community Honda, a California Corporation (JFM-96-1054); NELSON PONTIAC, d/b/a Nelson Honda, a California Corporation (JFM-96-1504); OTOBAI INCORPORATED, d/b/a Honda of Pasadena, a California Corporation (JFM-96-1504); JOHN BRYANT MOTORS, d/b/a Bryant Honda, a California Corporation (JFM-96-1504); VINCI, INCORPORATED, d/b/a Las Vegas Honda, a Nevada Corporation (JFM-96-1504); STEWART OLDS, INCORPORATED, d/b/a Stewart Honda, a California Corporation (JFM-96-1504); GOODWIN MOTORS, INCORPORATED, d/b/a Goodwin Honda, a California Corporation (JFM-96-1504); GARSTEN MOTORS, INCORPORATED, d/b/a Garsten Honda, a New York Corporation (JFM-96-1507); JUNE JENSEN, (JFM-96-1505); BYRNES-MCCARTHY, INCORPORATED, a New Hampshire Corporation (JFM-96-1724); PARADISE PONTIAC, INCORPORATED, an Ohio Corporation (JFM-96-1702); NAULT ENTERPRISES, INCORPORATED, d/b/a Nault's Honda, a New Hampshire Corporation (JFM-96-1774); JAMES

MCKOANE ENTERPRISES, INCORPORATED, a California Corporation (JFM-96-1915); HARDIN OLDSMOBILE, d/b/a Hardin Honda, a California Corporation (JFM-96-1838); RULE, INCORPORATED, d/b/a Rule Honda, a Virginia Corporation (JFM-96-2757); COASTAL IMPORTS, INCORPORATED, d/b/a Vista Honda 126 East, a California Corporation (JFM-96-2758); INTERNATIONAL AUTOMOBILES, INCORPORATED, a New Jersey Corporation (JFM-96-2778); PHILIP WINTER, an Oregon resident (JFM-96-2716); Frederick H. Powell, (JFM-96-1489); POWELL'S AUTO CENTER, INCORPORATED, (JFM-96-1489); G. MARSHALL BUTLER, (JFM-96-3447); M. BUTLER, INCORPORATED, (JFM-96-3447); PHC AUTOMOTIVE, INCORPORATED, a Georgia Corporation (JFM-96-3448); FIRST INTERNATIONAL MOTORS INCORPORATED AND SUCCESSOR IN INTEREST TO D'IMPORTS, INCORPORATED, d/b/a D'Honda, a California Corporation (JFM-96-3743); PORTER CHEVROLET, INCORPORATED, (JFM-96-3893); CLARENCE B. SMAIL, an individual (JFM-96-3932); JAMES A. SMAIL, an individual (JFM-96-3932); BUD AND JIM SMAIL, INCORPORATED, a Pennsylvania Corporation (JFM-96-3932); JOHNSON MOTOR COMPANY, INCORPORATED, d/b/a Johnson Honda-Nissan, an Ohio Corporation (JFM-96-726); D & C CHEVROLET COMPANY, d/b/a D & C Honda, a New Jersey Corporation in case (JFM-96-3858); BILL RULE, INCORPORATED, d/b/a Honda Nissan of Covington, a Virginia Corporation (JFM-96-4026); WOODSON PONTIAC, INCORPORATED, d/b/a Richard Woodson Honda, a Virginia Corporation (JFM-97-186); ALVIN'S ENTERPRISES, INCORPORATED, d/b/a Alvin's Honda Sales, a Pennsylvania Corporation (JFM-97-201); COLONIAL LIMITED, INCORPORATED, d/b/a Colonial Honda; S & R Auto Sales, Incorporated, d/b/a Roger Miller Honda of

Huntington Beach, a California Corporation; ROGER MILLER IMPORTS, INCORPORATED, d/b/a Roger Miller Acura of Beverly Hills, a California Corporation; BEVERLY HILLS R & R, INCORPORATED, d/b/a Roger Miller Honda of Beverly Hills; C.H. JORGENSEN, d/b/a Jorgensen's Honda, a Corporation (JFM-97-1624); YONKERS MOTORS CORPORATION, d/b/a Yonkers Motors, a New York Corporation (JFM-95-3271); JOY LIBERT GELB, (JFM-95-3271) Yonkers Motors Corporation; BILL EDWARDS OLDSMOBILE, INCORPORATED, a Virginia Corporation (JFM-97-2945); WILLIAM EDWARDS, SR., (JFM-97-2945); WILLIAM EDWARDS, JR., (JFM-97-2945); KLEIN FOREMAN MOTORS, INCORPORATED, d/b/a Foreman Honda, a California Corporation (JFM-97-852); FRAHM HONDA, a California Corporation (JFM-97-3006); GENE GABBARD, INCORPORATED, d/b/a Gene Gabbard Lincoln Mercury, d/b/a Gene Gabbard's Stockton Lincoln Mercury Honda, a California Corporation (JFM-97-3224); GENE GABBARD, (JFM-97-3224); JAMES GABBARD, (JFM-97-3224); GARY GABBARD, (JFM-97-3224); HARVEY & MADDING, INCORPORATED, d/b/a Dublin Honda, a California Corporation (JFM-97-3212); HARVEY & SONS, INCORPORATED, d/b/a Hayward Acura, a California Corporation (JFM-97-3212); KEN HARVEY, (JFM-97-3212); HARRY CRAMER HONDA; STANFORD A. CRAMER, individually in JFM-97-1330; WPS, INCORPORATED, d/b/a Honda Cars of Columbia, JFM-97-1288; DOROTHY VAN DALSEM, as Executrix of the Estate of William M. Van Dalsem (JFM-95-2716); COLONIAL LIMITED, INCORPORATED, d/b/a Colonial Honda, a California Corporation (JFM-97-1136); BALISE MOTOR SALES COMPANY, d/b/a Balise Honda, a Massachusetts Corporation (JFM-98-1286); BARR MOTORS, INCORPORATED, d/b/a Barr Honda, a Pennsylvania Corporation (JFM-98-1299); STEVE

HOPKINS, INCORPORATED, a California Corporation (JFM-98-1497); LARRY HOPKINS, INCORPORATED, a California Corporation (JFM-98-1497); STEVE HOPKINS, a California resident (JFM-98-1497); MENARD & HOLMBERG, INCORPORATED, d/b/a Menard & Holmberg Honda/Isuzu, a Massachusetts Corporation (JFM-98-933); PIONEER EDSEL SALES, INCORPORATED, d/b/a Pioneer Honda, Honda, a California Corporation (JFM-98-828); SOUTH CITY, INCORPORATED, d/b/a South City Honda, a California Corporation (JFM-98-1023); ED WITTMEIER FORD, INCORPORATED, d/b/a Wittmeier Honda, a California Corporation (JFM-98-1025); SHERWOOD IMPORTS, INCORPORATED, d/b/a Sherwood Honda, (JFM-98-1755); TAMAROFF BUICK, INCORPORATED, d/b/a Tamaroff Honda, (JFM-98-1756); LESLIE SEGEL, an Oregon resident (JFM-98-2315); SEGEL ENTERPRISES, INCORPORATED, d/b/a Town & Country Cadillac Oldsmobile Honda, a California Corporation (JFM-98-2315); FRANK MITCHELL, JFM-98-2438; JAY MITCHELL, a California resident (JFM-98-2438); B-J MARCHESE MOTOR COMPANY, a Pennsylvania Corporation (JFM-98-2812); B.J. MARCHESE HONDA, (JFM-98-2812); B.J. MARCHESE, (JFM-98-2812); MARSHALL CHEVROLET, VOLVO, HONDA, INCORPORATED, a Pennsylvania Corporation (JFM-98-3821); HENRY C. MARSHALL, individually (JFM-98-3821); GLOBE AUTO IMPORTS, d/b/a Globe Honda, a Florida Corporation (JFM-98-4064); JAMES MCFREDERICK, a Florida resident (JFM-98-4064); CALE YARBOROUGH MOTORS OF SOUTH CAROLINA, INCORPORATED, d/b/a Cale Yarborough Honda-Mazda, (JFM-98-1828); CALE YARBOROUGH MOTORS OF GA, INCORPORATED, d/b/a Cale Yarborough Honda, (JFM-

98-827); GOODWIN VOLKSWAGEN, INCORPORATED, d/b/a Goodwin Honda; ALAN L. STROUSE; CLOVIS HONDA

Plaintiffs

v.

RICHARD H. BROOKS; STANLEY JAMES CARDIGES; HUGH P COOPER; DENNIS R. JOSLEYN; ROBERT N. RIVERS; ROBERT A. MAZATELLI; EDWARD A. TEMPLE; BLAKELY CONSULTANTS & DEVELOPMENT, INCORPORATED; HONDA MOTOR COMPANY, LTD.; RAYMOND W. HOVSEPIAN; COMMONWEALTH INSURANCE COMPANY; JOHN W. BILLMYER; ROGER NOVELLY; RICHARD DITARANTO; DOES 1-50; KOICHI AMEMIYA; YOSHIDE MUNEKUNI; MARK L. BENSON; DAMIEN C. BUDNICK; DAVID L. PEDERSEN; THOMAS A. CAULFIELD, a California Resident; JOHN J. CONWAY, a New Jersey Resident; LYON & LYON, a California Partnership; ROLAND N. SMOOT, a California Resident; FREDERICK W. MEIS, JR., a Texas Resident; FRANK PISANO, a Colorado Resident; BEATRICE SIKORA; LARRY C. FINLEY; PETER EPSTEEN; JOSEPH R. HENDRICK, III, a North Carolina Resident; ANGELO FALCONI, a Pennsylvania Resident; CLIFF PECK; JOHN ROSATTI; WILLIAM SCHUILING; JOSEPH POPE, a California Resident; SHAU WAI LAM, a New Jersey Resident; HENRY KHACHATURIAN, d/b/a Hank Torian, a California Resident; MID PENINSULA MOTORS, INCORPORATED, a California Corporation; AUTO CAR, INCORPORATED, a California Corporation; EDGREN MOTORS, INCORPORATED, a California Corporation; MARTIN LUSTGARTEN; DOES 1-100, inclusive; JOHN L. HENDRICK, a North Carolina Resident; HENDRICK AUTOMOTIVE GROUP, a North Carolina Corporation; DAH CHONG HONG, LTD., a

California Corporation; DAH CHONG HONG TRADING CORPORATION, a/k/a DCH, a New York Corporation; HONDA NORTH AMERICA, INCORPORATED; HENDRICK MANAGEMENT CORPORATION; L.L.L. SALES COMPANY, INCORPORATED; DCH (OXNARD) INCORPORATED; DAVID MCDAVID; VINCENT PIAZZA; SANTO GEORGE POLING; J.R.H., INCORPORATED; WILLIAM O. MUSGRAVE; CHARLES V. RICKS; WESH, INCORPORATED; CANYON HONDA, A CALIFORNIA CORPORATION; CANYON ACURA, a California Corporation; RICK HINES, an individual; CORONA HONDA, a California Corporation; DAVID CONANT; VIRGINIA'S FIRST FAMILY OF FINE CARS INCORPORATED, d/b/a Brown Oldsmobile Honda Saab, a Virginia Corporation; AL SHENG, an individual; EARL PILCHER, (JFM-96-3447); B.D.A. ENTERPRISES CORPORATION, formerly known as Town & Country Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); BARRY ALEXANDER, (JFM-96-3448); RICK HENDRICK, a New Jersey Resident (JFM-96-3858); LYON & LYON, a California Partnership; ROLAND N. SMOOT, A CALIFORNIA RESIDENT; NFI INCORPORATED, a Corporation (JFM-96-4026); Bird, Bethea, Jordan & Griffin, P.A.; IRVING H. LASEROW, JFM-95-2492 Metro Auto, Incorporated; I.H. LASEROW AND COMPANY, P.C., JFM-95-2493 METRO AUTO, INCORPORATED; EDWIN R. TAYLOR; DOES 8-50; TASHA, INCORPORATED; RICK HENDRICK HONDA CARS COMPANY, JFM-97-1288; TOWER H. LTD.; DCH INVESTMENTS, INCORPORATED, (California); CIVIC CENTER MOTORS, LTD., d/b/a White Plains Honda, a New York Corporation; 31-37 NORTH MOORE STREET CORPORATION; RICK HEINZ, Hardin Oldsmobile JFM-96-1838; PAUL T. BOHLANDER; SUNSHINE HONDA; RICHARD H. BROOKS;

CLARENCE FINCHER; TETSUO CHINO, former California Resident and now residing in the Nation of Japan; HENDRICK MANAGEMENT COMPANY LIMITED PARTNERSHIP; HENDRICK CORPORATION; HENDRICK AUTOMOTIVE GROUP; HENDRICK MANAGEMENT CORPORATION; THOMAS DEL FRANCO; WILLIAM KUTCHERA; JAMES A. THOMPSON, a Florida Resident; LINDA LUSTGARTEN, a Pennsylvania Resident; SCOTT LUSTGARTEN, a Pennsylvania Resident; CLASSIC AUTO GROUP, INCORPORATED, a New Jersey Corporation; SCOTT IMPORTS, INCORPORATED, d/b/a Main Line Honda, a Pennsylvania Corporation; MARTIN NEWARK DEALERSHIPS, INCORPORATED, d/b/a Martin Honda, a Delaware Corporation; THE TED STEVENS CAR COMPANY, INCORPORATED, a California Corporation; THEODORE J. STEVENS, a California Resident; WHITE PLAINS HONDA, a New York sole proprietorship; PAUL SINGER; JOHN D'ELIA;

Defendants

AMERICAN HONDA MOTOR COMPANY, INCORPORATED

Defendant & Third Party Plaintiff

v.

LAWRENCE SILVER; SILVER & FIELD;

Movants-Appellees

and

MIDDLETOWN MOTORS, INCORPORATED; RICHARD CATENA; IMPORTS OF FREEHOLD, INCORPORATED; GRAND MOTOR CAR COMPANY, INCORPORATED; R.C. CALDWELL IMPORTS, INCORPORATED; DAVID TRAINER; HOLLYWOOD IMPORTS LIMITED; PLAZA MOTORS OF BROOK-

LYN, INCORPORATED; HEMPSTEAD MOTORS, LIMITED; NORTH PALM IMPORTS, LIMITED; CRYTAL BAY IMPORTS, LIMITED; PARAMUS WORLD MOTORS, INCORPORATED; DARON MOTORS, INCORPORATED; DCH MOTORS, INCORPORATED; DCH MANHATTAN; STEPHEN S. BIRD; BETHEA, JORDAN & GRIFFIN, P.A.; JOHN W. BILLMYER; S. JAMES CARDIGES; ROBERT A. MAZZITELLI; ROGER NOVELLY; DAMIEN C. BUDNICK; DAVID L. PEDERSEN; MARK L. BENSON; JOHN J. CONWAY; CLARENCE FINCHER; JOHNNY R. FINCHER; WILLIAM VINCE; WAYNE VINCE; W. RODMAN RYAN; WILLIAM LIA, JR.; DON LIA; DENNIS R. JOSLEYN; HUGH P COOPER; ROBERT N. RIVERS; FREDERICK W. MEIS, JR.; BEATRICE SIKORA; WILLIAM SCHUILING; DAVID TRAINOR; SANTO GEORGE POLING; VINCENT RADLEY; KAREN RADLEY; FRANK PISANO; LARRY C. FINLEY; THOMAS A. CAULFIELD; PETER EPSTEEN; HENDRICK CORPORATION; ANGELO FALCONI; MID-PENINSULA MOTORS, INCORPORATED; AUTO CAR, INCORPORATED; EDGREN MOTOR COMPANY; DON CARLTON; RICHARD CATENA; JOHN ROSATTI; DAH CHONG HONG, LTD.; L.L.L. SALES COMPANY, INCORPORATED; DCH (OXNARD) INCORPORATED; RAYMOND HOVSEPIAN; IRVING H. LASEROW; I.H. LASEROW AND COMPANY, P.C.

Third Party Defendants

No. 01-2229
CA-95-1069-MDL

In Re: AMERICAN HONDA MOTOR COMPANY, INCORPORATED, Dealerships Relations Litigation

ROGER MILLER; RUTH MILLER,
Plaintiffs-Appellees

and

BERNARDI'S INCORPORATED, d/b/a Bernardi Honda, a Massachusetts Corporation (JFM-95-3314); PYE AUTOMOBILE SALES, INCORPORATED, (JFM-99-3136); RICHARD C.D. HUNT, III, (JFM-94-3499); PEGGY HUNT, (JFM-94-3499); RICK HUNT FORD, INCORPORATED, (JFM-94-3499); ROBERT J. VATLAND, (JFM-95-2415); METRO AUTO, INCORPORATED, d/b/a Metro Honda, (JFM-95-2493) formerly; DOMINICK ROCCO, (JFM-95-2493); SHIRLEY ROCCO, (JFM-95-2493); FLYNN MOTORS, INCORPORATED, d/b/a, American Honda of Hammonton, (JFM-95-2494); JOHN J. FLYNN, JR., (JFM-95-2494); JANE MENDELSOHN, a/k/a Robert W. Mendelsohn, solely in her capacity as Executrix of the Estate of (JFM-95-2494); ROBBIN LINDSAY TORESCO, (JFM-95-2495); JACK REVELLE, (JFM-95-2517); ROCHESTER WORLD CAR CORPORATION, (JFM-95-2517); LIVERPOOL WORLD CAR CORPORATION, d/b/a Honda City, d/b/a Honda City, (JFM-95-2517); BILL MCDAVID PONTIAC, GMC TRUCKS, HONDA, INCORPORATED, d/b/a Bill McDavid Honda, (JFM-95-2584); BILL MCDAVID MOTORS, INCORPORATED, d/b/a Bill McDavid Acura of Arlington, (JFM-95-2584); BILL MCDAVID,

INCORPORATED, d/b/a Bill McDavid Acura of Fort Worth; VIC BAILEY HONDA, INCORPORATED, (JFM-95-2598); CLAUDIA CLOSE, d/b/a, Jim Close House of Honda, d/b/a House of Honda, as Executrix of the Estate of James R. Close, Humphrey Motors, Inc.; HUMPHREY MOTORS, INCORPORATED, a/k/a Jim Close House of Honda, a California Corporation (JFM-95-2713); SIERRA MOTORS, INCORPORATED, d/b/a Sierra Motors, Incorporated, a Nevada Corporation (JFM-95-2712); JAMES MCKOANE ENTERPRISES, INCORPORATED, d/b/a Clawson Honda of Fresno, a California Corporation (JFM-95-2728); BREAKAWAY INCORPORATED, d/b/a, Breakaway Honda, a South Carolina Corporation (JFM-95-2804) (JFM-95-2728); CENTURY LINCOLN-MERCURY, INCORPORATED, a South Carolina Corporation (JFM-95-2728); INTERNATIONAL MOTOR WERKS, INCORPORATED, d/b/a Honda Motor Works, a Wisconsin Corporation (JFM-95-3043); AUSTIN MOTORS, INCORPORATED, d/b/a Honda City, a New York Corporation (JFM-95-3044); STAFFORD HONDA, INCORPORATED, a Texas Corporation (JFM-95-3045); CITY MOTORS SALES COMPANY, a New Jersey Corporation (JFM-95-3046); PACE OLDSMOBILE, INCORPORATED, d/b/a Pace Honda, a New York Corporation (JFM-95-3047); AUTOSPORT, INCORPORATED, a New Jersey Corporation (JFM-95-3048); PENSACOLA AUTO MART, INCORPORATED, a Florida Corporation (JFM-95-3065); FRANK BORMAN, Col., a New Mexico resident (JFM-95-2716); FRED BORMAN, a North Carolina resident (JFM-95-2716); JEFF CONNOLE, d/b/a Borman Motor Company, a New Mexico resident, individually and doing business as (JFM-95-2716); WILLIAM M. VAN DALSEN, a California resident (JFM-95-2716); WILLIAM J. BRONSON, an Oregon resident (JFM-95-2716); AL REILLY, a California resident (JFM-95-2716); MILDRED RADER, d/b/a

Pioneer Honda, a California resident, individually and on behalf of all others similarly situated (JFM-95-2716); BORMAN MOTOR COMPANY, Limited Liability Company, (JFM-95-2716); PRECISION IMPORTS OF FARMINGTON, INCORPORATED, A New Mexico Corporation (JFM-95-2714); RANCOURT, INCORPORATED, d/b/a Carmichael Honda, (JFM-95-2715); TRANS OCEANIC MOTORS, INCORPORATED, d/b/a Cardinal Honda, (JFM-95-2695); CLAIR INTERNATIONAL, INCORPORATED, d/b/a Clair Honda, (JFM-95-3315); CLAIR'S INCORPORATED, d/b/a Clair Acura, (JFM-95-3315); JAMES E. CLAIR, (JFM-95-3315); RICHARD LUNDGREN, INCORPORATED, d/b/a Lundgren Honda, a Massachusetts Corporation (JFM-95-3313); BILL KRAUSE AUTOMOTIVE, INCORPORATED, a California Corporation (JFM-95-3414); WILLIAM A. KRAUSE, (JFM-95-3414); SAWYER AUTO IMPORTS, INCORPORATED, a Delaware Corporation (JFM-95-3417); BAY RIDGE HONDA, a New York Corporation (JFM-95-3418); RENSSELAER AUTO PLAZA, INCORPORATED, d/b/a Rensselaer Honda, (JFM-95-3416); ROMOR INVESTMENTS, INCORPORATED, formerly Crown Motors which did business as Century Motors, a California Corporation (JFM-95-3729); COOPER, INCORPORATED, d/b/a Selma Honda, a dissolved California Corporation (JFM-95-53); MILLER AUTO SALES, INCORPORATED, d/b/a Miller Honda-Volkswagon-Isuzu-Suzuki, a Virginia Corporation (JFM-96-382); KACHINA INVESTMENTS, INCOPORATED, a/k/a Wayne L. Culiver, a/k/a Wanyne Culliver Ford, Incorporated, a/k/a Hacienda Motor Company, Incorporated, an Arizona Corporation, as successor in interest to (JFM-96-602); BLW, INCORPORATED, d/b/a Luby Chevrolet Company, Incorporated, formerly (JFM-96-637); FAIRFIELD MOTORS, INCORPORATED, a New Hampshire

Corporation (JFM-96-1438); JACK BROWN IMPORTS, INCORPORATED, an Illinois Corporation (JFM-96-1506); SIERRA AUTO CARS, INCORPORATED, d/b/a Sierra Honda, a California Corporation (JFM-96-1504); POMONA VALLEY IMPORTS, INCORPORATED, a California Corporation (JFM-96-1504); MAJESTIC PONTIAC, d/b/a Majestic Honda, d/b/a Majestic Pontiac & Honda, a California Corporation (JFM-96-1504); KAISER BROTHERS, d/b/a Kaiser Brothers Oldsmobile & Honda, a California Corporation (JFM-96-1504); BOB JACKSON & SON, d/b/a Honda Santa Ana, a California Corporation (JFM-96-1504); COMMUNITY PONTIAC, d/b/a Community Pontiac Honda, d/b/a, Community Honda, a California Corporation (JFM-96-1054); NELSON PONTIAC, d/b/a Nelson Honda, a California Corporation (JFM-96-1504); OTOBAI INCORPORATED, d/b/a Honda of Pasadena, a California Corporation (JFM-96-1504); JOHN BRYANT MOTORS, d/b/a Bryant Honda, a California Corporation (JFM-96-1504); VINCI, INCORPORATED, d/b/a Las Vegas Honda, a Nevada Corporation (JFM-96-1504); STEWART OLDS, INCORPORATED, d/b/a Stewart Honda, a California Corporation (JFM-96-1504); GOODWIN MOTORS, INCORPORATED, d/b/a Goodwin Honda, a California Corporation (JFM-96-1504); GARSTEN MOTORS, INCORPORATED, d/b/a, Garsten Honda, a New York Corporation (JFM-96-1507); JUNE JENSEN, (JFM-96-1505); BYRNES-MCCARTHY, INCORPORATED, a New Hampshire Corporation (JFM-96-1724); PARADISE PONTIAC, INCORPORATED, an Ohio Corporation (JFM-96-1702); NAULT ENTERPRISES, INCORPORATED, d/b/a Nault's Honda, a New Hampshire Corporation (JFM-96-1774); JAMES MCKOANE ENTERPRISES, INCORPORATED, a California Corporation (JFM-96-1915); HARDIN OLDSMOBILE, d/b/a Hardin Honda, a California Corporation (JFM-96-1838); RULE,

INCORPORATED, d/b/a Rule Honda, a Virginia Corporation (JFM-96-2757); COASTAL IMPORTS, INCORPORATED, d/b/a Vista Honda 126 East, a California Corporation (JFM-96-2758); INTERNATIONAL AUTOMOBILES, INCORPORATED, a New Jersey Corporation (JFM-96-2778); PHILIP WINTER, an Oregon resident (JFM-96-2716); Frederick H. Powell, (JFM-96-1489); POWELL'S AUTO CENTER, INCORPORATED, (JFM-96-1489); G. MARSHALL BUTLER, (JFM-96-3447); M. BUTLER, INCORPORATED, (JFM-96-3447); PHC AUTOMOTIVE, INCORPORATED, a Georgia Corporation (JFM-96-3448); FIRST INTERNATIONAL MOTORS INCORPORATED AND SUCCESSOR IN INTEREST TO D'IMPORTS, INCORPORATED, d/b/a D'Honda, a California Corporation (JFM-96-3743); PORTER CHEVROLET, INCORPORATED, (JFM-96-3893); CLARENCE B. SMAIL, an individual (JFM-96-3932); JAMES A. SMAIL, an individual (JFM-96-3932); BUD AND JIM SMAIL, INCORPORATED, a Pennsylvania Corporation (JFM-96-3932); JOHNSON MOTOR COMPANY, INCORPORATED, d/b/a Johnson Honda-Nissan, an Ohio Corporation (JFM-96-726); D & C CHEVROLET COMPANY, d/b/a D & C Honda, a New Jersey Corporation in case (JFM-96-3858); BILL RULE, INCORPORATED, d/b/a Honda Nissan of Covington, a Virginia Corporation (JFM-96-4026); WOODSON PONTIAC, INCORPORATED, d/b/a Richard Woodson Honda, a Virginia Corporation (JFM-97-186); ALVIN'S ENTERPRISES, INCORPORATED, d/b/a Alvin's Honda Sales, a Pennsylvania Corporation (JFM-97-201); COLONIAL LIMITED, INCORPORATED, d/b/a Colonial Honda; S & R Auto Sales, Incorporated, d/b/a Roger Miller Honda of Huntington Beach, a California Corporation; ROGER MILLER IMPORTS, INCORPORATED, d/b/a Roger Miller Acura of Beverly Hills, a California Corporation; BEVERLY HILLS R & R,

INCORPORATED, d/b/a Roger Miller Honda of Beverly Hills; C.H. JORGENSEN, d/b/a Jorgensen's Honda, a Corporation (JFM-97-1624); YONKERS MOTORS CORPORATION, d/b/a Yonkers Motors, a New York Corporation (JFM-95-3271); JOY LIBERT GELB, (JFM-95-3271) Yonkers Motors Corporation; BILL EDWARDS OLDSMOBILE, INCORPORATED, a Virginia Corporation (JFM-97-2945); WILLIAM EDWARDS, SR., (JFM-97-2945); WILLIAM EDWARDS, JR., (JFM-97-2945); KLEIN FOREMAN MOTORS, INCORPORATED, d/b/a Foreman Honda, a California Corporation (JFM-97-852); FRAHM HONDA, a California Corporation (JFM-97-3006); GENE GABBARD, INCORPORATED, d/b/a Gene Gabbard Lincoln Mercury, d/b/a Gene Gabbard's Stockton Lincoln Mercury Honda, a California Corporation (JFM-97-3224); GENE GABBARD, (JFM-97-3224); JAMES GABBARD, (JFM-97-3224); GARY GABBARD, (JFM-97-3224); HARVEY & MADDING, INCORPORATED, d/b/a Dublin Honda, a California Corporation (JFM-97-3212); HARVEY & SONS, INCORPORATED, d/b/a Hayward Acura, a California Corporation (JFM-97-3212); KEN HARVEY, (JFM-97-3212); HARRY CRAMER HONDA; STANFORD A. CRAMER, individually in JFM-97-1330; WPS, INCORPORATED, d/b/a Honda Cars of Columbia, JFM-97-1288; DOROTHY VAN DALSEM, as Executrix of the Estate of William M. Van Dalsem (JFM-95-2716); COLONIAL LIMITED, INCORPORATED, d/b/a Colonial Honda, a California Corporation (JFM-97-1136); BALISE MOTOR SALES COMPANY, d/b/a Balise Honda, a Massachusetts Corporation (JFM-98-1286); BARR MOTORS, INCORPORATED, d/b/a Barr Honda, a Pennsylvania Corporation (JFM-98-1299); STEVE HOPKINS, INCORPORATED, a California Corporation (JFM-98-1497); LARRY HOPKINS, INCORPORATED, a California Corporation (JFM-98-1497); STEVE HOPKINS, a

California resident (JFM-98-1497); MENARD & HOLMBERG, INCORPORATED, d/b/a Menard & Holmberg Honda/Isuzu, a Massachusetts Corporation (JFM-98-933); PIONEER EDSEL SALES, INCORPORATED, d/b/a Pioneer Honda, Honda, a California Corporation (JFM-98-828); SOUTH CITY, INCORPORATED, d/b/a South City Honda, a California Corporation (JFM-98-1023); ED WITTMEIER FORD, INCORPORATED, d/b/a Wittmeier Honda, a California Corporation (JFM-98-1025); SHERWOOD IMPORTS, INCORPORATED, d/b/a Sherwood Honda, (JFM-98-1755); TAMAROFF BUICK, INCORPORATED, d/b/a Tamaroff Honda, (JFM-98-1756); LESLIE SEGEL, an Oregon resident (JFM-98-2315); SEGEL ENTERPRISES, INCORPORATED, d/b/a Town & Country Cadillac Oldsmobile Honda, a California Corporation (JFM-98-2315); FRANK MITCHELL, JFM-98-2438; JAY MITCHELL, a California resident (JFM-98-2438); B-J MARCHESE MOTOR COMPANY, a Pennsylvania Corporation (JFM-98-2812); B.J. MARCHESE HONDA, (JFM-98-2812); B.J. MARCHESE, (JFM-98-2812); MARSHALL CHEVROLET, VOLVO, HONDA, INCORPORATED, a Pennsylvania Corporation (JFM-98-3821); HENRY C. MARSHALL, individually (JFM-98-3821); GLOBE AUTO IMPORTS, d/b/a Globe Honda, a Florida Corporation (JFM-98-4064); JAMES MCFREDERICK, a Florida resident (JFM-98-4064); CALE YARBOROUGH MOTORS OF SOUTH CAROLINA, INCORPORATED, d/b/a Cale Yarborough Honda-Mazda, (JFM-98-1828); CALE YARBOROUGH MOTORS OF GA, INCORPORATED, d/b/a Cale Yarborough Honda, (JFM-98-1827); GOODWIN VOLKSWAGEN, INCORPORATED, d/b/a Goodwin Honda; ALAN L. STROUSE; CLOVIS HONDA

Plaintiffs

v.

RICHARD H. BROOKS; STANLEY JAMES CARDIGES; HUGH P COOPER; DENNIS R. JOSLEYN; ROBERT N. RIVERS; ROBERT A. MAZATELLI; EDWARD A. TEMPLE; BLAKELY CONSULTANTS & DEVELOPMENT, INCORPORATED; HONDA MOTOR COMPANY, LTD.; RAYMOND W. HOVSEPIAN; COMMONWEALTH INSURANCE COMPANY; JOHN W. BILLMYER; ROGER NOVELLY; RICHARD DITARANTO; DOES 1-50; KOICHI AMEMIYA; YOSHIDE MUNEKUNI; MARK L. BENSON; DAMIEN C. BUDNICK; DAVID L. PEDERSEN; THOMAS A. CAULFIELD, a California Resident; JOHN J. CONWAY, a New Jersey Resident; LYON & LYON, a California Partnership; ROLAND N. SMOOT, a California Resident; FREDERICK W. MEIS, JR., a Texas Resident; FRANK PISANO, a Colorado Resident; BEATRICE SIKORA; LARRY C. FINLEY; PETER EPSTEEN; JOSEPH R. HENDRICK, III, a North Carolina Resident; ANGELO FALCONI, a Pennsylvania Resident; CLIFF PECK; JOHN ROSATTI; WILLIAM SCHUILING; JOSEPH POPE, a California Resident; SHAU WAI LAM, a New Jersey Resident; HENRY KHACHATURIAN, d/b/a Hank Torian, a California Resident; MID PENINSULA MOTORS, INCORPORATED, a California Corporation; AUTO CAR, INCORPORATED, a California Corporation; EDGREN MOTORS, INCORPORATED, a California Corporation; MARTIN LUSTGARTEN; DOES 1-100, inclusive; JOHN L. HENDRICK, a North Carolina Resident; HENDRICK AUTOMOTIVE GROUP, a North Carolina Corporation; DAH CHONG HONG, LTD., a California Corporation; DAH CHONG HONG TRADING CORPORATION, a/k/a DCH, a New York Corporation; HONDA NORTH AMERICA, INCORPORATED; HENDRICK MANAGEMENT CORPORATION; L.L.L. SALES COMPANY, INCORPORATED; DCH (OXNARD) INCORPORATED; DAVID MCDAVID;

VINCENT PIAZZA; SANTO GEORGE POLING; J.R.H., INCORPORATED; WILLIAM O. MUSGRAVE; CHARLES V. RICKS; WESH, INCORPORATED; CANYON HONDA, A CALIFORNIA CORPORATION; CANYON ACURA, a California Corporation; RICK HINES, an individual; CORONA HONDA, a California Corporation; DAVID CONANT; VIRGINIA'S FIRST FAMILY OF FINE CARS INCORPORATED, d/b/a Brown Oldsmobile Honda Saab, a Virginia Corporation; AL SHENG, an individual; EARL PILCHER, (JFM-96-3447); B.D.A. ENTERPRISES CORPORATION, formerly known as Town & Country Automotive, Incorporated, a Georgia Corporation (JFM-96-3448); BARRY ALEXANDER, (JFM-96-3448); RICK HENDRICK, a New Jersey Resident (JFM-96-3858); LYON & LYON, a California Partnership; ROLAND N. SMOOT, A CALIFORNIA RESIDENT; NFI INCORPORATED, a Corporation (JFM-96-4026); Bird, Bethea, Jordan & Griffin, P.A.; IRVING H. LASEROW, JFM-95-2492 Metro Auto, Incorporated; I.H. LASEROW AND COMPANY, P.C., JFM-95-2493 METRO AUTO, INCORPORATED; EDWIN R. TAYLOR; DOES 8-50; TASHA, INCORPORATED; RICK HENDRICK HONDA CARS COMPANY, JFM-97-1288; TOWER H. LTD.; DCH INVESTMENTS, INCORPORATED, (California); CIVIC CENTER MOTORS, LTD., d/b/a White Plains Honda, a New York Corporation; 31-37 NORTH MOORE STREET CORPORATION; RICK HEINZ, Hardin Oldsmobile JFM-96-1838; PAUL T. BOHLANDER; SUNSHINE HONDA; RICHARD H. BROOKS; CLARENCE FINCHER; TETSUO CHINO, former California Resident and now residing in the Nation of Japan; HENDRICK MANAGEMENT COMPANY LIMITED PARTNERSHIP; HENDRICK CORPORATION; HENDRICK AUTOMOTIVE GROUP; HENDRICK MANAGEMENT CORPORATION;

THOMAS DEL FRANCO; WILLIAM KUTCHERA; JAMES A. THOMPSON, a Florida Resident; LINDA LUSTGARTEN, a Pennsylvania Resident; SCOTT LUSTGARTEN, a Pennsylvania Resident; CLASSIC AUTO GROUP, INCORPORATED, a New Jersey Corporation; SCOTT IMPORTS, INCORPORATED, d/b/a Main Line Honda, a Pennsylvania Corporation; MARTIN NEWARK DEALERSHIPS, INCORPORATED, d/b/a Martin Honda, a Delaware Corporation; THE TED STEVENS CAR COMPANY, INCORPORATED, a California Corporation; THEODORE J. STEVENS, a California Resident; WHITE PLAINS HONDA, a New York sole proprietorship; PAUL SINGER; JOHN D'ELIA;

Defendants,

AMERICAN HONDA MOTOR COMPANY, INCORPORATED

Defendant & Third Party Plaintiff,

v.

LAWRENCE SILVER; SILVER & FIELD;

Movants-Appellants

and

MIDDLETOWN MOTORS, INCORPORATED; RICHARD CATENA; IMPORTS OF FREEHOLD, INCORPORATED; GRAND MOTOR CAR COMPANY, INCORPORATED; R.C. CALDWELL IMPORTS, INCORPORATED; DAVID TRAINER; HOLLYWOOD IMPORTS LIMITED; PLAZA MOTORS OF BROOKLYN, INCORPORATED; HEMPSTEAD MOTORS, LIMITED; NORTH PALM IMPORTS, LIMITED; CRYTAL BAY IMPORTS, LIMITED; PARAMUS WORLD MOTORS, INCORPORATED; DARON MOTORS, INCORPORATED; DCH MOTORS, INCORPORATED; DCH MANHATTAN; STEPHEN S.

BIRD; BETHEA, JORDAN & GRIFFIN, P.A.; JOHN W. BILLMYER; S. JAMES CARDIGES; ROBERT A. MAZZITELLI; ROGER NOVELLY; DAMIEN C. BUDNICK; DAVID L. PEDERSEN; MARK L. BENSON; JOHN J. CONWAY; CLARENCE FINCHER; JOHNNY R. FINCHER; WILLIAM VINCE; WAYNE VINCE; W. RODMAN RYAN; WILLIAM LIA, JR.; DON LIA; DENNIS R. JOSLEYN; HUGH P COOPER; ROBERT N. RIVERS; FREDERICK W. MEIS, JR.; BEATRICE SIKORA; WILLIAM SCHUILING; DAVID TRAINOR; SANTO GEORGE POLING; VINCENT RADLEY; KAREN RADLEY; FRANK PISANO; LARRY C. FINLEY; THOMAS A. CAULFIELD; PETER EPSTEEN; HENDRICK CORPORATION; ANGELO FALCONI; MID-PENINSULA MOTORS, INCORPORATED; AUTO CAR, INCORPORATED; EDGREN MOTOR COMPANY; DON CARLTON; RICHARD CATENA; JOHN ROSATTI; DAH CHONG HONG, LTD.; L.L.L. SALES COMPANY, INCORPORATED; DCH (OXNARD) INCORPORATED; RAYMOND HOVSEPIAN; IRVING H. LASEROW; I.H. LASEROW AND COMPANY, P.C.

Third Party Defendants.

On Petition for Rehearing and Rehearing En Banc

The appellants/cross-appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
PATRICIA S. CONNOR
Clerk

APPENDIX H

All Writs Act
(Title 28 U.S.C.)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX I

Federal Arbitration Act (selected provisions) (9 U.S.C.)

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 10. Same; vacation; grounds; rehearing (West Supp. 2002)

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 16. Appeals

(a) appeal may be taken from—

(1) order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX J

California Code of Civil Procedure (selected provisions)

§ 1285 (West 1982). Petition; parties

Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.

§ 1286 (West 1982). Powers of court

If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding.

§ 1286.2 (West Supp. 2003). Grounds for Vacation of Award

(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

(1) The award was procured by corruption, fraud or other undue means.

(2) There was corruption in any of the arbitrators.

(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or

by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.9 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

(b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7.

§ 1286.4 (West 1982). Conditions to vacation of award

The court may not vacate an award unless:

(a) A petition or response requesting that the award be vacated has been duly served and filed; or

(b) A petition or response requesting that the award be corrected has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.

§ 1287 (West 1982). Rehearing

If the award is vacated, the court may order a rehearing before new arbitrators. If the award is vacated on the grounds set forth in subdivision (d) or (e) of Section 1286.2, the court with the consent of the parties to the court proceeding may order a rehearing before the original arbitrators.

If the arbitration agreement requires that the award be made within a specified period of time, the rehearing may nevertheless be held and the award made within an equal period of time beginning with the date of the order for rehearing but only if the court determines that the propose of the time limit agreed upon by the parties to the arbitration agreement will not be frustrated by the application of this provision.

§ 1287.6 (West 1982). Force and effect of unconfirmed or vacated award

An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration.

§ 1288 (West 1982). Petition; time for service and filing

A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of service of a signed copy of the award on the petitioner.

No. 02-1687

JUN 11 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROGER MILLER and RUTH MILLER,

Petitioners,

v.

LAWRENCE SILVER and SILVER & FIELD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James P. Ulwick
Counsel of Record
KRAMON & GRAHAM, P.A.
Commerce Place
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752-6030

Counsel for Respondents

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court agree to review an injunction issued by the District Court which prevented Ruth and Roger Miller from using misrepresentations and concealments to collaterally attack a class action settlement which they chose to accept and which the District Court then approved and entered as a judgment?

2. Should this Court grant review of the District Court's injunction when that injunction was essential in order for the District Court to manage its proceedings, vindicate its authority, and effectuate its decrees, as expressly set forth in this Court's decision in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S.Ct. 1673 (1994), when the Millers did not challenge such authority below, and when there is no conflict in the circuits regarding the existence of such authority?

LIST OF PARTIES

The caption on the Fourth Circuit Opinion lists all of the parties to the original multi-district class action litigation. None of those parties has any interest in the present action; the parties affected by these proceedings are Ruth and Roger Miller, Lawrence Silver, and Silver & Field.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 13

ARGUMENT 13

A. The District Court Had Exclusive Jurisdiction To Enforce The Class Action Settlement 13

B. Silver & Field Made No Collateral Attack 18

C. There Is No Conflict Between The Circuits 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases:

In Re American Honda Motor Company, Inc., Dealerships Relations Litigation, 315 F.3d 417 (2003) 1

In Re American Honda, 941 F. Supp. 528 (1996) 1

Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S.Ct. 1673 (1994) ..... i, 17

Rochin v. Pat Johnson Manufacturing Company, 67 Cal.App.4th 1228, 79 Cal.Rptr.2d 719 (1998) 19

Shepherd v. American Honda, 822 F. Supp. 625 (N.D. Cal. 1993) 2, 3, 23

Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001) 20, 21, 22, 23

United States v. District of Columbia, 654 F.2d 802 (D.C. Cir. 1981) 22

Statute:

28 U.S.C. §1407 14

Rules:

FED. R. CIV. P. 23 ..... 14, 18, 20

FED. R. CIV. P. 23(b)(2) 22

FED. R. CIV. P. 23(b)(3) 22

FED. R. CIV. P. 23(e) 15

Other Authority:

7 Witkin, California Procedure,
4th Ed., §286 19

OPINIONS BELOW

The Opinion of the Fourth Circuit appears under the name In Re American Honda Motor Company, Inc., Dealerships Relations Litigation, 315 F.3d 417 (2003). The Opinion of the District Court can be found under the same name at 162 F. Supp.2d 387 (2001).

STATEMENT OF THE CASE

The facts of this case are unusual, if not unique. To understand the context of the District Court's injunction it is helpful to have a basic understanding of the Honda bribery scandal and the class action settlements which resolved it ("MDL"). The District Court outlined the allegations of the bribery scandal in In Re American Honda, 941 F. Supp. 528 (1996). Silver & Field will describe below their representation of the Millers in that scandal and the settlement which the Millers attempted to collaterally attack.

The Petition omits a number of significant facts and misstates others. Silver & Field will correct those errors by reciting the facts in full and correcting any misstatements at the appropriate place in the narrative. Except as otherwise noted, the recitation will follow that of the District Court at Joint Appendix ["JA"] 1827-30. As a result of its extensive familiarity with the massive Honda bribery litigation over a period of four years, that Court was as thoroughly familiar with the facts as any court could ever be.

The Millers purchased Huntington Beach Honda from Ed Smith and Scott Robinson in mid-December 1986. As part of the purchase price, they paid $7 million for the "good will" of the dealership. A portion of the purchase price was to be paid over time, and the Millers personally guaranteed promissory notes given to the sellers. The Millers defaulted on the notes, and in March 1994, the widow of Ed Smith brought suit against them in the Superior Court of California for Orange County.

The Millers, who were not then represented by Silver & Field, filed a cross-complaint against Mrs. Smith and joined Mrs. Robinson, the widow of Scott Robinson, as a defendant on the cross-complaint. The cross-complaint raised, in very brief terms, some of the bribery issues which later became the focus of the MDL proceedings over which the District Court presided.

In July 1994, Silver & Field took over representation of the Millers. JA 579-80. On April 11, 1995, Silver & Field filed on the Millers' behalf a First Amended Cross-Complaint (JA 1196-1266) in the State Court proceeding. Silver & Field named American Honda as a defendant in the First Amended Cross-Complaint and asserted RICO and common law fraud claims arising out of the Honda bribery - scandal.[1]

The second claim is false as found by the District Court at JA 1830-1. Moreover, the Millers made materially inconsistent statements to the District Court about this issue. ***Compare*** counsel's argument that the basis for the arbitrator's award was not the alleged failure to comply with Shepherd, but the failure to bring the action in federal court (JA 1764:16-1765:16), ***with*** the completely inconsistent argument to the arbitrator at JA 1076-82 (a conflict noted by

---

1 The Millers make two important misstatements at Petition p. 2 ["Pet. 2"]: (a) that Silver & Field brought their case in state court rather than in federal court as was done with other clients; and (b) that Silver & Field failed to plead a causal connection between the bribery scheme and the Millers' injuries (such pleading being arguably essential pursuant to the decision in Shepherd v. American Honda, 822 F. Supp. 625 (N.D. Cal. 1993)).

The implicit first claim -- that Silver & Field treated the Millers differently than its other clients -- omits two critical facts. First, *the Millers' case was already in state court.* This was inescapable -- the Millers could not control the pleadings because they were defendants and *because predecessor counsel had already raised the bribery claims in defense.* Second, the point is irrelevant because the Honda case was ultimately resolved as a class action; it made no difference whatsoever whether the Millers were in state court or federal court. And see JA 1829-30, n. 3.

the District Court at JA 1829-30 n. 3); and also *compare* counsel's assertion that Silver & Field first raised the Shepherd issue and the Millers only responded to it (JA 1765:13-16 and 1766:18-24) *with* the completely inconsistent claim – **in the same hearing** – that the Millers had pleaded the Shepherd issue in their malpractice complaint (JA 1817:1-17).

Honda filed a demurrer to the RICO claim in the First Amended Cross-Complaint on the ground that the Millers had failed to plead legally sufficient RICO damages. On November 9, 1995, Judge Tully Seymour, to whom the case was assigned, sustained the demurrer without leave to amend but "without prejudice to the cross-complainants filing a motion to reconsider the court's decision denying leave to amend . . .."[2]

In accordance with this order, Silver & Field filed a motion for reconsideration. Judge Seymour denied the motion and reaffirmed his original order.

The relationship between the Millers and Silver & Field deteriorated, and after the Millers threatened to assert claims for malpractice against Silver & Field, the firm withdrew its appearance. Thereafter, against Silver & Field's advice, the Millers voluntarily dismissed the claims they had filed in the California State Court action and re-filed them (JA 642-793) in the United States District Court for the Central District of California. The case was transferred to the District Court as part of the MDL. The Millers were represented in the MDL by the firm of Duane, Morris & Heckscher ("Duane, Morris"). Duane, Morris represented several other plaintiffs as well, and members of the firm served on the Plaintiffs' Executive Committee in the MDL.

---

[2] The Millers' discussion of the status of the state law claims (Pet. 2 n. 1) is accurate, but omits relevant subsequent events. See JA 632 n. 11 and accompanying text.

In September 1997, Honda filed a motion to dismiss the Millers' MDL Complaint on the ground that the voluntary dismissal of the California action after the sustaining of a demurrer constituted a dismissal with prejudice. JA 154-96. The Millers argued in opposition that Judge Seymour's ruling was not a final order, so dismissal could not convert it into one. JA 223:6-15; 237:16-23. At a telephone hearing in early July 1998, the District Court indicated that it was inclined to refer the issue to California courts to determine the effect of the dismissal. However, the intervening MDL settlement, which the Millers accepted, made it unnecessary for the court to issue a ruling.

The first Honda settlement was negotiated between Honda and class plaintiffs in approximately mid-July 1998. The Millers' assertion (Pet. 3) that this settlement "did not encompass claims for legal malpractice" is irrelevant in the only sense in which it is true, and untrue in the only sense in which it is relevant. The exact terms of the settlement are essential to understanding the District Court's injunction and are described below.

The Settlement Agreement defined two types of claims, namely "Allocation Claims" and "Non-Allocation Claims". The Settlement Agreement created two different funds for these respective claims, the settlement fund and the reserve fund. The settlement fund compensated class members for their Allocation Claims pursuant to the plan of distribution. An Allocation Claim was defined as "any claim, allegation or assertion arising in any way from the allocation or distribution of Honda automobiles . . .." JA 497; 499; 502-6.

Class members, including the Millers, were notified of the settlement in the Notice of Class Action Settlement (JA 539). That Notice generally described the terms of the settlement, including the right to opt out and the plan of distribution. Paragraph 14 (JA 543) advised that "if you

remain in the class . . . you will be bound by the settlement agreement and any approval orders entered by the court."

Under the terms of the Settlement Agreement, Honda agreed to pay $329.8 million to those dealers who accepted the Settlement Agreement. The funds were to be distributed to the individual dealers according to a formula developed by class counsel. Pursuant to that formula, the Millers were to receive $6.32 million in the settlement.

In fact, the amount the Millers were told they were to receive was a mistake. It was $1 million too high under the plan of distribution formula that was used in determining the amounts to be paid to settling class members. The formula contemplated that each dealer would be paid $4,000 for each car which, as estimated by a regression analysis, the dealer had not received because of the bribery scheme. Some dealers, like the Millers, purchased their dealership during the class period, and were entitled to compensation only for those cars that were apportioned under the settlement formula to the dealership after the date of their purchase. This apportionment ordinarily was easy to accomplish because – apparently in all cases other than the Millers – Honda assigned a new dealer number when the dealership changed hands. The Millers, however, were given the same dealer number as their predecessors, and therefore received an apportionment of all of the cars to which their dealership was entitled in 1986 despite the fact that they did not purchase the dealership until mid-December of that year. This resulted in a misapportionment to them of 250 cars, which in turn resulted in an excess recovery of $1 million.[3]

---

[3] A subsequent action against Honda resulted in additional recovery to class members. The Millers' share of that settlement (a total of $890,488) was approximately 14.09% of the inflated amount they received in the first settlement. See, e.g., JA 965 (exact amount not then known). The Millers therefore received an excess of $1,140,900 at the expense of other class members.

The Millers assert that this recovery, excessive though it was failed to compensate them for supposed additional damages they suffered in purchasing their dealership from a bribe paying dealer. However, shortly before the deadline to accept or reject the Honda settlement, the Millers received a letter from their counsel, Duane, Morris, advising them to accept the class settlement and the money they were to receive under the allocation formula. JA 1582:6-12; 1290-1300. That letter made two points relevant to their claims:

1. The Millers were particularly interested in recovering damages for their overpayment for the good will of the dealership ("blue sky damages"). Duane, Morris explained the problems with this demand:

> "As we explained, the 'overpayment of blue sky' damages are already, to a significant degree, factored into the allocation damage calculation because the amount of blue sky paid for a dealership is directly related to the dealership's annual profits which, in turn, directly relate to the number of cars received and sold. Nevertheless, . . . Neil Demchick [the Millers' expert witness in the MDL] analyzed the "overpayments" for Huntington Beach Honda as a separate damage element in the state court litigation between you and the Smiths, and concluded that the overpayment for Huntington Beach Honda totaled $2.3 million. This brings your present value total damage amount . . . – including an overpayment adjustment – to approximately $6 million for Huntington Beach **[i.e., less than the $6.32 million they were to receive in the class settlement]** . . ..

> "However, as we have discussed at length, there is significant risk that the damages you claim for the overpayment of blue sky for Huntington Beach Honda would be ruled by a court to be unrecoverable because they are not *proximately caused* by American Honda. We have discussed with you this concept of proximate cause at length, because it is our considered legal opinion that while these overpayment damages may have properly been recoverable from the Smiths and/or the Robinsons, it is unlikely that a court would find that Honda was liable for these damages." JA 1293. The District Court elaborated on these points at JA 1832.

2. The Millers' counsel told them that they were getting extra damages as a result, apparently, of an error by class counsel:

> "Finally, as we explained, we were additionally able to parlay to our benefit the fact that you purchased the stock, rather than only the assets, from S&R. In particular, it was not entirely clear to the class attorneys at what point you took over the dealership from Smith & Robinson. We did not expand upon this with them. However, it is safe to say that if the class attorneys looked into this in depth, they would realize that they allocated you an extra year of cars to which you would otherwise not be entitled. We believe that without our good relationship with the class attorneys, we would not have been able to squeeze this extra year of damages out of them. Nevertheless, you would not be able to justify this extra year if this case went to trial. This extra year in damages gives you

roughly another 400 cars, or $1.6 million." JA 1295. See also JA 1603-5; 1739-41; 1749-51; 1795-6.[4]

The Millers decided to accept the class settlement. When they did so, they petitioned the District Court for a delay of 60 days in the settlement on the ground that there was purportedly "no disclosure to class members of class counsel's, experts and litigation costs and petition for fees" [sic]. They also asked the Court "to limit all contingency fees sought from class members and request class members be only charged reasonable hourly fees in order to preclude excessive, exorbitant and improbable fees." JA 794; 976. Their petition was denied.

The Millers did not, however, disclose to the District Court their view that the Honda settlement was unfair, inadequate, and unreasonable because it did not compensate them and similarly situated class members for their blue sky damages. Nor did the Millers reveal that they were reserving their right to pursue such a claim against their former attorney. JA 1834. Instead they accepted the settlement, and accepted the findings contained in the Approval Order that "**the methodology proposed by the settling parties constitutes a fair and reasonable estimate of the damages suffered by the plaintiff class as a result of the alleged wrongful conduct of the defendants.**" Id. and JA 547.

Nor did the Millers contest the finding of the District Court "that the distribution plan is fair and reasonable and should be implemented." Id. Nor did the Millers contest the finding by the District Court that "the methodology

---

[4] Later investigation, described in the record citations mentioned, showed that the extra year only resulted in an extra 250 cars/$1 million. The Millers denied to the District Court and to the Fourth Circuit that they received the excess payment, but do not persist in this denial in their Petition.

developed by [class experts] has adequately demonstrated that the class representatives and litigating dealers sustained injury common to the class as a whole and that the impact of that injury on each class member can be accurately estimated by the economic model that forms the basis of the proposed settlement." Id. and JA 549.

On October 9, 1998, the District Court entered the Approval Order. In that Order, the District Court found "the Settlement Agreement to be fair, adequate and reasonable, and in the best interests of the plaintiff settlement class as a whole . . .." JA 550:15-16. It further found that "the distribution plan as presented to the Court is fair and reasonable, is in the best interests of the plaintiff settlement class and shall be implemented consistent with the terms of the Settlement Agreement." JA 550:17-19. The Court also found "that the proposed settlement will provide a recovery to members of the plaintiff class in an amount that is a fair estimate of the damages suffered as a result of defendants' alleged conduct." JA 548:18-20.

The Settlement Agreement provided that the District Court would retain jurisdiction over the settlement. The Approval Order states that "this Court shall have and retain **exclusive** jurisdiction with respect to (i) implementation, interpretation and enforcement of the Settlement Agreement; (ii) supervision, allocation and distribution of settlement funds; and (iii) any applications or disputes concerning attorneys fees, costs and expenses which may arise." JA 550:27-551:3, emphasis added.

On January 20, 1999, Silver & Field filed a lien against the settlement proceeds due to be distributed to the Millers. JA 551A. The lien was based upon a claim of compensation for work Silver & Field had performed for the Millers, including a quantum meruit claim for a portion of the Millers' recovery in the MDL Settlement. JA 1606-7.

The Millers moved to strike the notice of lien on the ground that the District Court lacked jurisdiction. JA 558-73. Silver & Field opposed the motion to strike and requested that the District Court exercise jurisdiction over the entire dispute between themselves and the Millers. JA 605-35. The Millers assert (Pet. 4) that Silver & Field did **not** request that the District Court take jurisdiction over the Millers' claims. The District Court -- which certainly knew -- expressly held to the contrary: "Silver requested that I adjudicate the merits of both his fee claim and the claim for malpractice that the Millers were asserting against him." JA 1829.

In opposing Silver & Field's request, the Millers misrepresented that issues of state law would predominate in resolution of the dispute. They did not disclose that they would be asserting in the state proceedings a legal malpractice theory that would require an intimate knowledge of the legal issues involved in the Honda MDL proceedings. They also did not reveal that one of the contentions they intended to make in the arbitration proceeding was that the blue sky damages they were seeking were distinct from the allocation damages they had recovered in the MDL settlement. Resolution of that issue involved interpretation of the Settlement Agreement and, as the Millers knew, the Settlement Agreement conferred exclusive jurisdiction upon the District Court to interpret its terms. JA 1834.

By Order dated April 22, 1999 (JA 911-17), the District Court declined to exercise jurisdiction to adjudicate the dispute between the Millers and Silver & Field, finding, based upon what the Millers represented, that California state law would predominate in the resolution of that dispute. JA 1829. The District Court's statements at JA 916, esp. 2, clearly demonstrate that it understood that Silver & Field requested it to exercise jurisdiction over the entire dispute.

While the motion proceedings regarding the lien were pending before the District Court, the Millers filed a malpractice action against Silver & Field in the Superior Court of California. JA 865-87. After the District Court declined to exercise jurisdiction, Silver & Field moved to refer the claim to arbitration, and the California Superior Court so ordered.

The arbitration took place over 15 days between October and December, 2000. The Millers assert (Pet. 5) that Silver & Field did not attempt to preclude the Millers from making their arguments in the arbitration. This is just as incorrect as the claim that the firm did not ask the District Court to adjudicate the claims -- Silver & Field made three such attempts. JA 970; 1542:21-23.

The arbitrator, without issuing a written or oral decision, ruled in favor of the Millers in most respects, denying Silver & Field's claim for fees, and awarding the Millers $7,475,000 in "blue sky" damages to compensate them for the amount he found they had overpaid for the goodwill of their dealership and for which they allegedly did not receive compensation in the class settlement. JA 978-81.[5] The arbitrator did not make any award to the Millers for "allocation damages", because he was persuaded that the Millers had received fair compensation for such damages in the MDL proceedings. JA 979:20-25. The

---

5 The Millers make a peculiar claim about Mr. Field's testimony in the arbitration. They assert (Pet. 5, n. 3) that he admitted that dealers who purchased from bribe-paying dealers received no extra consideration in the class settlement. They appear to imply an admission to this effect. The case, however, was a class action. Mr. Field was neither a party to the settlement nor class action counsel. He could not make admissions regarding the terms of the Settlement Agreement. In any case, the pages of the record (JA 1717-18) do not support the Millers' assertion. What Mr. Field said was that purchasing from a bribing dealer would not, *as a matter of fact*, increase a plaintiff's damages. JA 1717:11-25. The District Court made the same point at JA 1832.

arbitrator subsequently entered a supplemental award granting the Millers attorneys fees and costs in the amount of $871,474.96.

On February 1, 2001, fifteen days after the arbitration award, but before the supplemental award of attorney fees, Silver & Field returned to the District Court and sought (JA 960-77) enforcement of the Settlement Agreement and reconsideration of the April 22, 1999, order declining to exercise jurisdiction over the dispute. The Millers filed opposition, JA 1434-49, and Silver & Field submitted a reply, JA 1520-6.

At the end of the hearing on March 1, 2001, the District Court allowed the arbitrator to decide the attorneys fees issue, but expressly stated that it would enjoin any attempt to "place that arbitration award into a position where it would be recorded or executed . . .." JA 1591:22-1592:12. The Court also permitted the parties to file additional briefing, which they did.

The District Court issued its Opinion and Order dated August 24, 2001. JA 1826-35. That Order granted Silver & Field's request for reconsideration, enjoined the Millers from attempting to collect the blue sky damages they were awarded in the arbitration, and allowed them to collect attorneys fees to the extent that those fees were not incurred in attempting to obtain the blue sky damages award. The District Court declined to exercise jurisdiction over other aspects of the dispute.

The Millers appealed this Order, JA 1836, and Silver & Field cross-appealed, JA 1838. The Fourth Circuit affirmed, holding that the District Court used its injunctive power "to protect its exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement" and "to rectify the injustice . . . the Millers had perpetrated by engaging in misconduct in order to defeat such jurisdiction."

SUMMARY OF ARGUMENT

The Petition assumes a false premise: that Silver & Field collaterally attacked an arbitration award. There was a collateral attack in this case, but the Millers were the ones making it (and using misrepresentation and concealment to do so). The District Court properly enjoined them from doing so.

Since the injunction below **prevents** a collateral attack, rather than approving one, the various policy arguments advanced by the Millers serve only to undercut their own case. The District Court did not exceed its jurisdiction, it acted in accord with this Court's express statement approving jurisdiction in such cases. The District Court did not infringe on state law, it prevented an infringement on its own jurisdiction. There is no conflict in the circuits; the only other appellate court to face a similar issue reached the same conclusion.

ARGUMENT

A. The District Court Had Exclusive Jurisdiction To Enforce The Class Action Settlement.

The Fourth Circuit recognized that the All Writs Act does not provide an independent basis for federal jurisdiction. It understood that the District Court's jurisdiction existed as a result of the MDL:

> "The district court's possession of subject matter jurisdiction over the claims of the Plaintiffs' Class in the MDL Proceedings is not in dispute. Neither is it disputed that, pursuant to the district court's Settlement Approval Order, the district court retained exclusive jurisdiction to interpret the terms of the MDL Settlement Agreement should any dispute over its meaning arise." Pet. A, 34a-35a, footnote omitted.

The Fourth Circuit was indisputably correct in these conclusions. The Millers never challenged – nor could they – the District Court's jurisdiction over the MDL or the class action which was certified as part of the MDL proceedings. Nowhere did the Millers ever deny that they were members of the class who accepted the class settlement. The jurisdiction of the District Court over the Millers personally, over the settlement funds, and over the finality of the settlement itself is beyond dispute. That jurisdiction arose directly out of the Millers' own MDL complaint asserting federal question jurisdiction (JA 642-793), which became vested in the District Court as a result of the transfer order of the MDL panel pursuant to 28 U.S.C. §1407, and is an essential prerequisite to any rights the Millers claim as a result of the District Court's Orders pursuant to F.R.C.P. 23.

The Fourth Circuit also understood that the Millers were attacking the MDL Settlement:

> "The record in this case leaves no doubt that one of the key issues before the arbitrator was whether the MDL Settlement Agreement compensated the Millers for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership.
>
> * * *
>
> Whether the Millers had already received full or partial compensation for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership undeniably raised in interpretive question under the MDL Settlement Agreement. Specifically, the Millers' argument regarding 'blue sky

> damages' versus 'allocation damages' raised an interpretive question regarding what damages the Millers received for their 'allocation claims' under the MDL Settlement Agreement. However, in flagrant disregard of the district court's exclusive jurisdiction to resolve such interpretative question, the Millers argued before the arbitrator that they were not compensated under the MDL Settlement Agreement for what they terms 'blue sky damages.'" Pet. A, 35a.

Again, the Fourth Circuit's conclusion can hardly be doubted. The Settlement Agreement (JA 494-538) -- to which the Millers were bound when they elected to remain in the class -- confirms the District Court's jurisdiction:

> "15.1 This Agreement is subject to, and the class certification is conditional upon entry by the Court following the Fairness Hearings(s) pursuant to Rule 23(e), of one or more order(s) and Judgment(s) [the 'Settlement Approval Order(s)']:
>
> * * *
>
> (f) Forever barring and enjoining the commencement of or maintenance by any Settling Class Member of any action, suit, or proceeding upon any Settled Claim . . ..
>
> * * *
>
> (i) Providing that this Court shall have and retain **exclusive** jurisdiction with respect to (i) implementation, interpretation, and enforcement of the settlement, and (ii) applications for attorneys' fees, costs, and expenses.
>
> * * *

19. CONTINUING JURISDICTION OF THE COURT

19.1 **This Court shall maintain and administer this Agreement and shall have exclusive and continuing jurisdiction, control and supervision of the Agreement and the Settlement Fund.**

19.2 **The Court shall have exclusive and continuing jurisdiction and control over any and all disputes arising from or relating to this Agreement, including but not limited to disputes concerning the interpretation of the Agreement and its terms, the Plan of Distribution, attorneys' fees, and/or the validity or timeliness of requests to opt out of the Settlement Class, ...**

19.3 **Any dispute under or relating to this Agreement shall be submitted to this Court.** In the event any dispute is submitted to the Court, each party concerned shall be entitled to twenty (20) days written notice (or otherwise, as the Court may for good cause direct), and the opportunity to submit evidence and to be heard on oral argument as the Court may direct. To the extent that additional or different procedures for dispute resolution are provided pursuant to any other provision of this Agreement, such other provision shall control. The prevailing parties to a dispute under this provision shall be entitled to its reasonable attorney's fees." (Emphasis added.)

The Approval Order confirmed this continuing jurisdiction: "[T]his Court shall have and retain exclusive jurisdiction with respect to (i) implementation,

interpretation and enforcement of the Settlement Agreement; (ii) supervision, allocation and distribution of the settlement fund; and (iii) any applications or disputes concerning attorneys' fees, costs, and expenses which may arise." JA 550:27-551:3.

Thus, under the specific terms of an agreement to which the Millers are parties, confirmed by the Approval Order, the District Court had not just jurisdiction, but exclusive jurisdiction over the MDL settlement and the distribution of the settlement funds, including claims to attorneys fees.

This Court expressly recognized the propriety of such jurisdiction in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 381, 114 S.Ct. 1673, 1677 (1994):

> "The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal -- either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."

Such jurisdiction is particularly important in class actions -- multiple, inconsistent proceedings can only be avoided if the supervising court retains control. The MDL settlement involved roughly 1800 class members located in every state in the Union. Piecemeal adjudication of disputes would have resulted in utter chaos.

The exclusive jurisdiction of the District Court over the settlement preceded the settlement as a matter of law, is essential to the implementation of orders issued pursuant to F.R.C.P. 23, is expressly granted by the Settlement Agreement to which the Millers are bound and under which they seek recovery, and is essential to protect the integrity of the MDL settlement. No credible challenge to that jurisdiction has been or could be made.

B. Silver & Field Made No Collateral Attack.

The facts of this case plainly show that it is the Millers who collaterally attacked the Approval Order by attempting to re-litigate the issue of damages before the arbitrator. Every argument they make, every case they cite, condemns their own Petition.

Nor is there any meaningful sense in which Silver & Field engaged in a collateral attack. Silver & Field first invoked the District Court's jurisdiction in April 1999, six months **before** the case was ordered to arbitration, and 18 months before the arbitration began. It hardly needs saying that Silver & Field could not "collaterally attack" a proceeding which had not yet taken place. The District Court ruled against Silver & Field in April 1999, but the August 24, 2001, Order granted reconsideration of the April 22, 1999, Order (JA 911-917). JA 1835. The grant of reconsideration means that the circumstances must be evaluated as of April 1999, not today.

Even if the matter were considered today, the Millers' own misconduct vitiates any argument that Silver & Field have made a collateral attack. The District Court ruled as it did in April 1999 because the Millers misrepresented the facts to it. JA 1834. They may not now attempt to benefit from those misrepresentations by denying the jurisdiction of the District Court to decide these issues.

Even on its own terms, the Millers' collateral attack argument fails. In the first place, California law -- and it is California law which must determine the preclusive effect of decisions made pursuant to that law -- recognizes that the doctrines of collateral estoppel and res judicata are inapplicable when a judgment is void for lack of subject matter jurisdiction:

> "Obviously a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud." 7 Witkin, California Procedure, 4th Ed., §286, p. 828.

In Rochin v. Pat Johnson Manufacturing Company, 67 Cal.App.4th 1228, 79 Cal.Rptr.2d 719 (1998), the Superior Court attempted to "correct" a judgment based upon a perceived judicial error. The Court of Appeal held that the Superior Court lacked subject matter jurisdiction to amend the judgment on that basis, 67 Cal.App.4th at 1238, 79 Cal.Rptr.2d at 725, and then stated that:

> "A judgment void on its face because rendered when the court lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had not power to grant, is subject to collateral attack at any time." Id. at 1239.

The other party contended that the failure to appeal from the amended judgment precluded the collateral attack. The Court of Appeal also rejected this argument, expressly stating that, "The doctrine of res judicata is inapplicable to void judgments." Id. It then quoted the language from Witkin cited above.

Given the void nature of the arbitration proceedings, the Millers' arguments about "principles of equity" make no sense. The question of having an adequate remedy at law hardly arises with respect to a decision rendered in the absence of subject matter jurisdiction. Since California law recognizes that such decisions are void, and subject to collateral attack, there is no basis for opposing an injunction against enforcement of such an award.

Here, the District Court retained its exclusive jurisdiction to resolve issues such as the interpretation of the Settlement Agreement. If the District Court's jurisdiction was exclusive – and exclusivity is crucial in class actions – the arbitrator had none. California law plainly recognizes that any "judgment" entered without subject matter jurisdiction, which the arbitrator attempted to do in this case, is void and subject to collateral attack.

C. **There Is No Conflict Between The Circuits.**

Since Silver & Field has not made any collateral attack, all the cases cited in the Petition are irrelevant. There is only one relevant case, and it reached the same result as the Fourth Circuit did here. There is no conflict in the circuits.

In Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001), the appellant was one of the representative plaintiffs in a class action in the District Court for the District of Columbia alleging that the State Department discriminated against black foreign service officers. After six years of litigation, the parties signed a consent decree resolving the case and agreeing that the district court should certify the class and approve settlement pursuant to Rule 23. Thomas, along with other class members, objected to the settlement and hired separate counsel to oppose the settlement at the fairness hearings. Nevertheless, the district court approved the settlement and the Court of Appeal affirmed.

Thomas and other class members then sued class counsel for professional negligence in the Superior Court of the District of Columbia. Class counsel moved the district court for an injunction against that action, and the district court granted it under the All Writs Act. Thomas appealed, and the Court of Appeal affirmed.

Thomas argued on appeal that the Anti-Injunction Act barred the injunction. The Court of Appeal rejected this argument and found that the re-litigation exception to the Anti-Injunction applied to Thomas' Superior Court action. The Opinion by the Court of Appeal disposes of most of the arguments raised by the Millers:

> "The [re-litigation] exception rests on the idea that federal courts should not be forced to rely on state court application of *res judicata* or estoppel principles to protect federal court judges and decrees. Although the attorney-defendants in the Superior Court action case were not parties to the completed federal action, traditional preclusion principles may nonetheless bar Thomas and his co-plaintiffs from prosecuting that action against them. The doctrine of collateral estoppel, or as it is now commonly called 'issue preclusion,' provides that 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.' The re-litigation exception to the Anti-Injunction Act therefore permits federal courts to enjoin state court adjudication of those 'claims or issues . . . [that] . . . actually have been decided by the federal court.'" 247 F.3d at 262-3, citations omitted.

The Circuit Court then pointed out that the re-litigation exception applied even in those cases where some of the issues raised in the state court action had not been decided by the federal courts. "If the plaintiff still could not prevail because an essential element of his state cause of action had already been determined against him in the federal suit, the re-litigation exception would permit an injunction against the state proceedings." Id. at 263. Indeed, the re-litigation exception allows federal courts to enjoin state proceedings that raise a different cause of action, but still threaten the judgment in the federal proceeding. Id., citing United States v. District of Columbia, 654 F.2d 802, 809-10 (D.C. Cir. 1981).

Thomas' Superior Court complaint clearly infringed on the federal class action judgment. He asserted that class action counsel breached a duty of loyalty to Thomas, failed to disclose an alleged conflict of interest, and failed to follow Thomas' express instructions. Thomas claimed that because of these alleged breaches of duty, he lost his federal cause of action and the potential damages that might have derived from it. These allegations directly conflicted with the district court's findings when approving the class action settlement that the "settlement is fair, adequate, and reasonable" and that class counsel "fairly and adequately protected the interests of the class." Id. at 263-4.

The Court of Appeal also rejected Thomas' claim that the retainer agreement between Thomas and class action counsel imposed additional duties on the class action attorneys. This claim was part of a larger argument that the class action attorneys committed professional malpractice by having the class action certified under Rule 23(b)(2) rather than Rule 23(b)(3). That claim also required re-litigating an issue already decided in the federal courts, and was, accordingly, properly enjoined. Id. at 265.

There is one difference between the opinion in Thomas and the injunction issued below -- in Thomas, the attorneys whose actions were questioned were class counsel. That difference, however, could not provide any basis at all for distinguishing the result in Thomas. In Thomas, the fact that the attorneys were class counsel was relevant to the issue preclusion argument, since the district court's findings regarding class counsel's representation formed the basis for the collateral estoppel argument. Here, the District Court's findings regarding damages constitute the basis for application of collateral estoppel, and the fact that the attorneys were individually retained rather than class counsel is irrelevant.

The decision in Thomas leaves open just one issue for resolution: did the Millers attempt to re-litigate in the arbitration proceedings an issue already decided by the District Court? The District Court described the Millers' claims before the arbitrator at JA 1829-30:

> "According to the Millers, Judge Seymour had sustained Honda's demurrer in the litigation in the Superior Court for Orange County because Silver has misplead RICO damages by not claiming 'concrete financial loss' as required by the decision in *Shepherd v. American Honda Motor Co.*, 822 F. Supp. 625 (N.D. Cal. 1993). Further, according to the Millers, Silver knew how to plead damages properly because in the case of *Austin Motors v. American Honda*, which he filed on behalf of other clients . . ., I overruled the motion to dismiss filed by the Honda defendants on *Shepherd* grounds. The sustaining of the demurrer in the California case led to the Millers' decision to dismiss that action. That dismissal, in turn, led to the motion to dismiss the Millers' claims filed by Honda in

> this court. Honda's motion was still pending before me when the MDL settlement was reached, and the Millers assert that their fear that I would grant the motion lead to accept the settlement instead of opting out. Finally, they contend, that if they had opted out, they would have pursued their case against Honda and received both the allocation damages they received as part of the MDL settlement and the blue sky damages they allegedly suffered as a result of having overpaid for their dealership."

See also JA 965-6.

The Approval Order clearly precludes this claim by the Millers. Most importantly, the Millers' underlying claim for blue sky damages was an Allocation Claim as defined in the Settlement Agreement. JA 1831-2; 1613-15; 1624-9. The Approval Order expressly found that the recovery obtained by the class for the Allocation Claims was "fair, adequate and reasonable" (JA 550:15-16); that the distribution plan, under which the Millers obtained their share of recovery, was "fair and reasonable" (JA 550:17-19); and that the settlement provided a recovery to members of the plaintiff class "in an amount that is a fair estimate of the damages suffered as a result of defendants' alleged conduct" (JA 548:18-20). The Millers are barred from attempting to collect additional damages on this claim.

In the Approval Order, the District Court reserved to itself the **exclusive** jurisdiction to interpret and enforce the Settlement Agreement. JA 550:27-551:3. This was not a case which some other court might reasonably disagree with the District Court, this was a case in which the District Court was the *sole* and *exclusive* court which could decide the correct interpretation of the term Allocation Claim as used in the Settlement Agreement. Thus, the Millers' argument

to the arbitrator directly conflicted with the exercise of jurisdiction by the District Court and was subject to injunction.

The fact that the Millers knowingly took $1 million from other class members when they accepted the settlement gives added force to the District Court's exercise of **exclusive** jurisdiction. Only the District Court was in position to evaluate the totality of the Millers' conduct, including the fact that they were attempting to use the MDL proceedings over which the District Court presided to become a vehicle for the commission of a substantial injustice. JA 1834-5. The District Court properly issued its injunction.

CONCLUSION

For all of the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: June 10, 2003

James P. Ulwick
Counsel of Record
Kramon & Graham, P.A.
Commerce Place
One South Street, Suite 2600
Baltimore, MD 21202-3201
Telephone (410) 752-6030
Facsimile (410) 539-1269

Attorneys for Respondents

(3)

JUL 1 2003

No. 02-1687

IN THE

Supreme Court of the United States

ROGER MILLER AND RUTH MILLER,
Petitioners,

v.

LAWRENCE SILVER AND SILVER & FIELD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

Of Counsel:
HERBERT J. PATT
ANDRES & ANDRES
2041 North Main Street
Santa Ana, CA 92706

* Counsel of Record

BARRY S. SIMON
PAUL MOGIN *
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. Respondents Collaterally Attacked the Arbitration Award	1
2. The Mere Assertion That the Arbitrator Lacked Jurisdiction Does Not Justify Disregard of Traditional Principles of Equity	4
3. Exclusive Federal Jurisdiction To Interpret a Class Action Settlement Does Not Extend to Disputes Between Class Members and Third Parties Who Raise a Defense of Double Recovery	6
4. This Case Is Not Similar to *Thomas v. Powell*	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page
Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999)	4, 5
Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994)	6, 7
Lehman Bros. v. Schein, 416 U.S. 386 (1974)	7, 8
Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001)	3
Norton v. Superior Court, 30 Cal. Rptr. 2d 217 (Ct. App. 1994)	9
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	8
Thomas v. Powell, 247 F.3d 360 (D.C. Cir.), *cert. denied*, 534 U.S. 951 (2001)	8, 9
Statutes:	
All Writs Act, 28 U.S.C. § 1651(a)	4, 5
Federal Arbitration Act, 9 U.S.C. §§ 1-16	1
Miscellaneous:	
Fed. R. Civ. P. 65	4
NORMAN SOLOVAY *et al.*, ALTERNATIVE DISPUTE RESOLUTION (2000)	3

REPLY TO BRIEF IN OPPOSITION

1. Respondents Collaterally Attacked the Arbitration Award.

Respondents do not dispute that whether arbitration awards may be collaterally attacked is an important question on which the circuits are in conflict. Instead, respondents repeatedly deny having collaterally attacked the arbitration award in this case.[1] But their denials cannot change undisputed facts.

After the arbitration ordered by the California state court at respondents' request culminated in an award in petitioners' favor, respondents did not file a timely petition to vacate the award, under either the California arbitration statute or the Federal Arbitration Act. Rather than follow the established procedure for review, respondents urged the District Court in Maryland to enjoin enforcement of the award. And rather than advance a recognized ground for overturning an arbitration award, respondents attacked the award as "manifestly unjust." C.A. App. 968. Indeed, they invoked the narrowness of the established grounds for review as a reason for the District Court to intervene. *Id.* 961 ("The award may not be overturned by the [California] Superior Court except upon a showing that it was procured by means of fraud, corruption, or undue means . . . ."). It is difficult to conceive of a clearer example of a collateral attack on an arbitration award.

Respondents say they made no collateral attack because they "first invoked the District Court's jurisdiction in April 1999," before the arbitration was ordered, and their post-

---

[1] *See* Br. Opp. 13 ("The Petition assumes a false premise: that Silver & Field collaterally attacked an arbitration award."), 18 ("Silver & Field Made No Collateral Attack. . . . Nor is there any meaningful sense in which Silver & Field engaged in a collateral attack."), 20 ("Silver & Field has not made any collateral attack").

arbitration motion in 2001 sought reconsideration of the April 1999 order declining to assume jurisdiction. Br. Opp. 18. Respondents' argument fails for two reasons.

First, in 1999 respondents requested only that the District Court adjudicate their entitlement to a lien, not that it adjudicate petitioners' malpractice claim.[2] The limited nature of respondents' request is reflected in the court's April 22, 1999 Memorandum, which identified the issues presented as "(1) whether this Court has jurisdiction to adjudicate the merits of the lien; and (2) whether the notice of the lien should be stricken." Appendix to Pet. Cert. ("A.") 66a-67a. Not until after the arbitration was conducted, and the arbitrator awarded damages to petitioners, did respondents urge the District Court to exercise jurisdiction over the malpractice claim.

Second, that respondents' post-arbitration motion purported to seek reconsideration of a pre-arbitration ruling does not change the substance of the motion. The motion sought to block enforcement of an award *in a completed arbitration*, and to do so by *bypassing the review procedures and standards established by federal and state arbitration statutes*. Respondents sought no relief from any court between the time petitioners' malpractice claim was sent to arbitration—on respondents' own motion—and the arbitrator's award. They did not ask any court to halt the arbitration or to limit the arguments petitioners were presenting. Only after the arbitrator's award did respondents argue to the District Court that petitioners' malpractice claim conflicted with the court's order approving the class action settlement. C.A App. 969. And respondents ignored the

---

[2] *See* C.A. App. 635 (respondents contend, in opposition to petitioners' motion to strike respondents' notice of lien, that the work respondents did in state court "fully justifies the lien"), 865-66 (declaration of respondent Lawrence Silver attaching petitioners' complaint for malpractice but not requesting that the District Court exercise jurisdiction over it).

established procedures and grounds for reviewing arbitration awards. For example, they attacked the award as "manifestly unjust." *Id.* 968. Yet this Court, in summarily reversing a federal appellate decision that had departed from the established grounds for review, has specifically held that judicial "consider[ation] [of] whether there is equity in a particular claim . . . usurps a function which . . . is entrusted to the arbitration tribunal." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001) (per curiam) (quotations omitted) (second ellipsis in original). Similarly, respondents faulted the arbitrator for "not explain[ing] his decision," C.A. App. 968, in spite of the fact that "[a]n award in United States commercial arbitrations . . . usually does not . . . contain a statement of findings or reasons . . . ." NORMAN SOLOVAY *et al.*, ALTERNATIVE DISPUTE RESOLUTION § 11.01[2] (2000).[3]

---

[3] Citing the District Court's statement in 2001 that petitioners in 1999 had "misrepresented that issues of state law would predominate in resolution of the dispute," A. 61a, respondents argue that petitioners "may not now attempt to benefit from those misrepresentations by denying the jurisdiction of the District Court to decide these issues." Br. Opp. 18. That argument is also unsound. First, as noted, the issues presented to the District Court in 1999 concerned the lien, not the malpractice claim. *See* p. 2, *supra*. What petitioners told the court in 1999 was that *"[t]he lien dispute* between the Millers and Silver involves only questions of California state law and arises from Silver's representation of the Millers before California state courts and regulatory bodies exclusively . . . ." C.A. App. 888 (emphasis added). That was absolutely true. Second, state-law issues also predominated in resolution of the malpractice claim. Third, because arbitration awards are not subject to collateral attack, the District Court had no business entertaining respondents' motion to enjoin enforcement of the arbitration award in the first place. The court could not confer on itself authority to hear a collateral attack merely by criticizing petitioners' arguments in 1999. The District Court itself primarily relied upon petitioners' "arguments before the arbitrator," rather than upon arguments made in court in 1999. A. 61a. Finally, the court could not properly have taken jurisdiction of the malpractice claim in 1999 even if it had been asked to do so and even if the parties could have predicted

Respondents attacked an arbitration award, and they did so through a procedure and on grounds at odds with the settled procedures and grounds for reviewing arbitration awards. By any standard, that is a collateral attack on an arbitration award.[4] This Court should decide whether such attacks are permissible.

2. The Mere Assertion That the Arbitrator Lacked Jurisdiction Does Not Justify Disregard of Traditional Principles of Equity.

The petition also asks this Court to clarify that a federal court's obligation to follow traditional principles of equity applies to injunctions under the All Writs Act, 28 U.S.C. § 1651(a), not just those under Fed. R. Civ. P. 65. *See* Pet. Cert. 19-26. Respondents again do not dispute the importance of the question. Nor do they dispute that the holding of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), applies to injunctions under the All Writs Act. Respondents' only argument is that whether a federal court is limited by traditional principles of equity "hardly arises" because the California arbitrator purportedly lacked jurisdiction to issue his decision. Br. Opp. 20. Respondents' argument not only depends upon a completely untenable view of the extent of the federal courts' exclusive jurisdiction, *see* Part 3, *infra*, but also confuses two

---

the issues that would later arise when the claim was arbitrated. It is therefore illogical to use criticism of petitioners' arguments in 1999 as a basis for saying the arbitrator impinged on the District Court's jurisdiction.

[4] Despite their many denials, ultimately even respondents appear to acknowledge that they collaterally attacked the arbitration award. *See* Br. Opp. 20 (arguing that the arbitrator lacked subject matter jurisdiction, and that under California law decisions made without jurisdiction "are void, and *subject to collateral attack*" (emphasis added)); *id.* (arguing that under California law "any 'judgment' entered without subject matter jurisdiction, which the arbitrator attempted to do in this case, is void and *subject to collateral attack*" (emphasis added)).

fundamentally distinct questions: (1) whether the arbitrator exceeded his jurisdiction; and (2) whether the District Court was authorized to enjoin enforcement of the award without following traditional principles of equity, including the requirement that there be no adequate remedy at law. *See* Pet. Cert. 20.

Even if there was a basis (which there was not) to question the arbitrator's jurisdiction,[5] under *Grupo Mexicano* the District Court should not have disregarded the long-standing limitations on the grant of equitable relief. Among other things, the District Court should have considered whether respondents had an adequate remedy at law, as in fact they did because they could have presented their jurisdictional argument to a California court through a petition to vacate filed under the California arbitration statute. This Court should make clear that federal courts cannot avoid the duty to apply traditional equitable principles merely by invoking the All Writs Act.

---

[5] In the arbitration itself, respondents raised no objection to the arbitrator's jurisdiction. Although respondents take issue with the statement in the petition that pointed out the absence of such an objection, Br. Opp. 11, the record citations they provide do not support their position that they contested the arbitrator's jurisdiction. One page cited by respondents merely contains the vague assertion of respondents to the District Court in 2001 that they had moved for summary judgment before the arbitrator "on, among other things, the subject of some of the matters that we have here." C.A. App. 1542. The other page cited merely contains respondents' assertion to the District Court in 2001 that they had argued to the arbitrator, in a motion for summary judgment, a motion in limine, and their concluding briefs, that the class action settlement agreement and the order approving it vested exclusive jurisdiction in the District Court. C.A. App. 970. Only the concluding briefs are in the record, and they contain no objection whatsoever to the arbitrator's jurisdiction. C.A. App. 1007-61, 1118-35.

3. Exclusive Federal Jurisdiction To Interpret a Class Action Settlement Does Not Extend to Disputes Between Class Members and Third Parties Who Raise a Defense of Double Recovery.

Respondents' argument as to the third question presented in the petition, which involves the reach of exclusive federal jurisdiction to interpret a class action settlement, primarily relies upon dicta in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994). Br. Opp. 17. When the dicta are read in context, it is apparent that they do not support respondents' position.

In *Kokkonen*, this Court held that, where a civil action in federal court is dismissed following a settlement agreement, without a reservation of jurisdiction to enforce the settlement agreement, the court lacks ancillary jurisdiction over a subsequent motion by one of the parties to enforce the agreement. *See* 511 U.S. at 379-80. The Court noted that it had previously asserted ancillary jurisdiction to permit disposition by a single court of factually interdependent claims, and to enable a court to manage its proceedings, vindicate its authority, and effectuate its decrees. *Id.* at 380. On neither basis, the Court concluded, could the district court exercise jurisdiction over the motion to enforce the agreement. *Id.* The Court added that "if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal," then "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Id.* at 381.

Respondents characterize the foregoing comment as an "express statement approving jurisdiction" in cases like the present one. Br. Opp. 13; *see also id.* 17. It is nothing of the kind.

First, *Kokkonen* does not say one word about *exclusive* federal jurisdiction. The Court discussed only whether federal jurisdiction existed *at all*. Yet the Fourth Circuit's decision in this case depends upon the notion that the arbitrator, in awarding damages on a state-law malpractice claim arising from legal services provided in state court, somehow usurped the District Court's exclusive jurisdiction. A. 35a.

Second, because *Kokkonen* involved a dispute between the original parties to an action in federal court, the Court's dicta clearly referred to a hypothetical dispute also involving *the original parties*, but where the parties' duty to comply with the settlement agreement had been made part of the order of dismissal. In contrast, here the Fourth Circuit asserted exclusive federal jurisdiction over a dispute between class members and *third parties*. Respondents were not parties to the class action settlement. Nor were they among the parties released in the settlement. *Kokkonen* simply does not speak to ancillary jurisdiction over disputes between parties to a federal settlement and third parties, let alone to the assertion of exclusive jurisdiction over such disputes.

Respondents also maintain that, after a nationwide federal class action settlement, federal court "control" over disputes between class members and third parties is necessary to avoid the "utter chaos" of resolving such disputes where class members reside. Br. Opp. 17. But respondents offer nothing to suggest that state courts and state arbitrators are incapable of deciding these disputes, or that "chaos" would result if the disputes were not swept into federal court. In general, the state court judges and arbitrators of a given state are more knowledgeable about the law of that state than a federal judge sitting in another state. *See Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974) ("When federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure which comes from sitting in

the jurisdiction." (quoting *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941))). It makes much more sense for a legal malpractice claim under California law, brought by California clients against a California attorney and law firm, over the conduct of litigation in a California state court, to be decided by a California court or arbitrator, than for the claim to be decided by a federal court three thousand miles away. The concept of ancillary jurisdiction should not be stretched to confer on the already-overburdened federal courts jurisdiction—much less exclusive jurisdiction—over state-law controversies between class members and nondiverse third parties.

4. This Case Is Not Similar to *Thomas v. Powell.*

Respondents maintain that there is no conflict in the circuits because *Thomas v. Powell*, 247 F.3d 260 (D.C. Cir.), *cert. denied*, 534 U.S. 951 (2001), is the "only . . . relevant case, and it reached the same result as the Fourth Circuit did here." Br. Opp. 20. But *Thomas* is not at all similar to this case, and the Fourth Circuit's decision is indeed in conflict with decisions in several circuits barring collateral attacks on arbitration awards. *See* Pet. Cert. 11-13.

Thomas involved a federal class action settlement and a later claim of legal malpractice, but that claim was brought *against class counsel* and attacked their handling of the settlement *before the federal court*. In contrast, petitioners' malpractice claim did not arise from anything class counsel had done—or indeed anything done by any attorney in the federal class action or the other MDL proceedings. "The Millers' claims in arbitration involved the completely distinct legal issue of whether, under California law, Silver committed malpractice in a prior state court action that was never before the district court." A. 46a (Traxler, J., dissenting); *see also* A. 45a (Traxler, J., dissenting) ("Silver did not participate in the MDL proceedings as either a litigant or as counsel for the Millers").

Respondents are wrong to characterize the difference between this case and *Thomas* as simply that here "the attorneys were individually retained rather than class counsel." Br. Opp. 23. Respondents did not represent petitioners in the MDL proceedings at all, and the malpractice claim challenged neither the class action settlement nor the conduct of class counsel—or anyone else—in negotiating the settlement. Respondents represented petitioners only in California state court. The malpractice claim concerned solely the representation respondents provided in state court.

In *Thomas*, unlike this case, each of the claims also required relitigating matters decided in the class action. For example, the plaintiffs "allege[d] that the class action attorneys 'sold out' their clients, that they engaged in collusive secret negotiations to the detriment of their clients," but the district court had "squarely decided otherwise" before it approved the class action settlement. *Thomas*, 247 F.3d at 264. Here, petitioners' malpractice claim did not require relitigating any matter decided in the class action. The class action had a bearing on petitioners' malpractice claim only because of the damages formula established by California law governing recovery for legal malpractice: "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission." *Norton v. Superior Court*, 30 Cal. Rptr. 2d 217, 221 (Ct. App. 1994). As required by California law, the arbitrator simply took account of "what was recovered" by petitioners in the class action. In doing so, the arbitrator did not do anything that could possibly be deemed a usurpation of the District Court's jurisdiction.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

BARRY S. SIMON
PAUL MOGIN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioners

Of Counsel:
HERBERT J. PATT
ANDRES & ANDRES
2041 North Main Street
Santa Ana, CA 92706

* Counsel of Record

July 1, 2003